No. 82-958

In The

Supreme Court of the United States

October Term, 1982

—o—

McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD; JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

JOINT APPENDIX

—o—

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RELEVANT DOCKET ENTRIES

District Court:	Date of Filing:
1. Clerk's minute sheet, page 1	4/09/80
2. Special Verdict	4/25/80
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7. Order granting plaintiff's Second Motion to Approach Jurors	5/05/80
8. Plaintiff's Motion for a New Trial	5/05/80
9. Defendant's Memorandum in Opposition to Plaintiff's Motion for New Trial	5/28/80
10. Order denying Plaintiff's Motion for New Trial	6/02/80

The opinion of the U. S. Court of Appeals is reproduced in the appendix to the Petition for Certiorari at A-1. The opinion is reported at 687 F. 2d 338. The order of the Court of Appeals denying petitioner's motion for rehearing is reproduced in the appendix to the Petition for Certiorari at A-13.

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TRANSCRIPT OF VOIR DIRE EXAMINATION

Now with that general background of your duties let's now Mr. Clerk, fill the jury box with 12 jurors and we will start with the selection of the jury.

The Clerk: As I call your name please step to the jury box.

Harvey Barnhill, Carolyn Engert, Patricia Murray, Max Frauenfelder, Steve Hillard, Diane Duke, Marguerite Finnigan, Ethelyn Roose, Donald Cook, Albert Elser—

Mr. Elser: Sir, you said I could be excused.

The Clerk: Mr. Elser, Your Honor, is going to school and he is also a teacher.

The Court: All right, we will excuse you. You may step aside.

The Clerk: David Kerns, Connie Gladhill, Ronald Payton.

The Court: Now ladies and gentlemen, we are going to ask you certain questions and please do not think that the attorneys or the Court—please do not think that we are trying to inquire too deeply into your personal lives, but we would like to know something about your background and history. And for that reason we will ask you certain questions. Eventually the attorneys will select the jurors that will actually try this case.

Now to the rest of you back there let me also ask all of you to listen to the questions that I ask and the statements that I make. And also listen to the questions that the attorneys ask, because it will save us considerable time if you are brought forward, which is quite possible.

Now let me first give you just a little background of the case. I said this was a civil case, and this is a personal injury case arising from the use of a lawn mower and it involves injury to the plaintiff, Billy G. Greenwood. This injury occurred on May 25, 1976, near Topeka. The injury occurred when Billy G. Greenwood came in contact with the blades of a Snapper riding lawn mower which was manufactured by the defendant in this case. Now the plaintiff claims that the lawn mower was defective and unreasonably dangerous, and for that reason the defend-

ant should be liable in damages to the plaintiff for the injuries suffered.

Now the defendant claims that the lawn mower was neither defective nor unreasonably dangerous and that there is no legal liability on the defendant's part arising out of the plaintiff's injuries.

Now this is just a brief summary of the claims of the parties, and the attorneys in their opening statements will tell you much more about the case than the Court has told you in this short time, but this will give you some background about the type of case that is going to be tried.

Let me also say to all of you that it is anticipated that this case will take approxin ately two weeks to try so that would help you fit this into your schedule. If you have any serious conflicts we will try to work around those conflicts.

I also need to say that we are going to try this case today, tomorrow, this is Tuesday, Wednesday and Thursday and then on Friday—this is Wednesday. All right, this is Wednesday. I've lost a day already. This is Wednesday. We will try this case Wednesday, and Thursday and then on Friday we are going to take the day off because the attorneys have certain conflicts in which they are scheduled to appear, at least one of the attorneys is scheduled to appear at a national conference and so for that reason we are going to have to take off. We will not try the case on Friday. Then the next week we would anticipate that we will try the case the full week and that should complete the case. We hope that we can work it in in that period of time. This is to give you an idea that we would try it Wednesday and Thursday of this week

and then the total of next week and we hope that we will be able to get all the evidence in to you at that time.

Now let me—in asking my questions I'm going to direct a few questions to you directly and then I will ask some general questions.

First Mr. Barnhill, let me talk to you. You are from Topeka, Kansas, and you are the Adjutant General of Kansas; is that correct?

Mr. Barnhill: I'm employed by the Kansas National Guard.

The Court: You are employed by the Kansas National Guard and you work for the Adjutant General of Kansas?

Mr. Barnhill: Yes.

The Court: And you are the personnel manager?

Mr. Barnhill. Personnel manager specialist.

The Court: And let me also find out how long have you been with the National Guard? Some period of time, or have you had any other past occupation that might be interesting to all of us?

Mr. Barnhill: Well, I have about 21 years with the National Guard.

The Court: All right. And in that particular work I assume you are responsible for personnel records, and responsible for hiring and certain things like that; is that correct?

Mr. Barnhill: That's correct.

The Court: And what is your wife's occupation.

Mr. Barnhill: She works for Northwestern National here in Topeka.

The Court. All right.

Mr. Barnhill: Insurance.

The Court: And that is an insurance company?

Mr. Barnhill. Yes.

The Court: What sort of insurance does Northwestern National sell? Is that life insurance or what? Tell me about that.

Mr. Barnhill: Well, they insure property.

The Court: All right.

Mr. Barnhill: She is an underwriter for that company.

The Court: All right.

Mrs. Engert, you are from Manhattan. Tell me what you do.

Mrs. Engert: I'm unemployed right now.

The Court: What did you do prior to being unemployed?

Mrs. Engert: A hysterology technician in a clinical laboratory.

The Court: All right. And are you married?

Mrs. Engert: No, I am not.

The Court: Now, as a lab technician what sort of education have you had there for that work?

Mrs. Engert: The training was all from the Peterson Lab. It was on-the-job training.

The Court: All right. Mrs. Murray, you are from Topeka and you work for SRS?

Mrs. Murray: Yes.

The Court: What do you do exactly?

Mrs. Murray: I work in the food stamp division where the food stamps are mailed out.

The Court: And you work for the—is it solely for the State of Kansas though?

Mrs. Murray: Yes.

The Court: Although you handle certain federal programs; is that correct?

Mrs. Murray: Yes.

The Court: What is your husband's occupation?

Mrs. Murray: He works for Dupont.

The Court: And what does he do exactly there?

Mrs. Murray: He works in the finishing department.

The Court: All right.

Mr. Frauenfelder, you are from Manhattan and you work for Star Incorporated?

Mr. Frauenfelder: Yes, sir.

The Court: Tell us what that is, please.

Mr. Frauenfelder: It's a farm organization. I'm a farm hand, work on a farm as a farm hand taking care of livestock.

The Court: And does this organization, do they have land around Manhattan; is that correct?

Mr. Frauenfelder: Yes, sir.

The Court: And I am not familiar—I came from Manhattan and I am not familiar with this. Is it Star Incorporated?

Mr. Frauenfelder: Yes.

The Court: Does any corporation own that?

Mr. Frauenfelder: There's Vanier's out of Salina own it.

The Court: I was going to suggest that probably that was Vanier's land.

Mr. Frauenfelder: Yes, and it's one of their organizations.

The Court: Where does your wife work?

Mr. Frauenfelder: She works for Stickles Cleaners in Aggieville.

The Court: All right. Mr. Hillard, you are from Alma and you work as a disability examiner for the State of Kansas?

Mr. Hillard: That's correct.

The Court: And are your offices here in Topeka?

Mr. Hillard: Yes, they are.

The Court: All right. And in your disability work tell us exactly what do you do there? Do you help in rehabilitation or—

Mr. Hillard: No, sir, I work—it's an SRS program. It's federally funded and I work for the State of Kansas adjudicating claims for Social Security on disability.

The Court: Are you married?

Mr. Hillard: Yes, I am.

The Court: What is your wife's occupation?

Mr. Hillard: She's a speech therapist.

The Court: At one of the schools?

Mr. Hillard: Yes, Wamego School District.

The Court: Miss Duke, you are from Topeka?

Miss Duke: Yes.

The Court: And you work for Frito-Lay?

Miss Duke: Right.

The Court: What do you do?

Miss Duke: I'm a data entry operator.

The Court: And are you married?

Miss Duke: No, I am not.

The Court: Mrs. Finnigan, you are from Frankfort, Kansas?

Mrs. Finnigan: Yes.

The Court: And you are an LPN?

Mrs. Finnigan: Yes.

The Court: Do you work in a hospital?

Mrs. Finnigan: I'm not employed right now, but I have—I have worked in all phases of nursing.

The Court: All right. And are you married?

Mrs. Finnigan: Yes.

The Court: What is your husband's occupation?

Mrs. Finnigan: My husband is retired. He worked in a feed mill.

The Court: All right. Mrs. Roose; is that right?

Mrs. Roose: Yes.

The Court: You are from Topeka and you work for J. M. McDonald Company?

Mrs. Roose: Yes.

The Court: And your husband works for Curtis-Knoll. Tell me what Curtis-Knoll is?

Mrs. Roose: They sell fasteners, and hardware for Curtis-Knoll.

The Court: Has he been in this line of work and have you been in this line of work for sometime?

Mrs. Roose: Yes.

The Court: All right.

Mr. Cook, you are from Emporia and you work for the City of Emporia?

Mr. Cook: Yes.

The Court: And what do you do there exactly, Mr. Cook?

Mr. Cook: I'm working foreman in the street department.

The Court: And your wife, where does she work?

Mr. Cook: Hopkins Manufacturing.

The Court: And have you worked for the City for sometime?

Mr. Cook: A little over 15 years.

The Court: All right.

Mr. Kerns, you are from Hiawatha and you do bookkeeping and office work for Schuetz Tool and Die?

Mr. Kerns: Yes.

The Court: Tell me about that company? Perhaps it tells me there, but what do they do exactly?

Mr. Kerns: Well, it's a small manufacturing concern that makes die sets that are used on these large presses to make blowers or other kinds of parts for machinery.

The Court: What is your wife's occupation?

Mr. Kerns: She's a cook and dining room attendant at the nursing home.

The Court: All right:. Mrs. Gladhill, you are from Abilene and you are a housewife?

Mrs. Gladhill: Yes.

The Court: And your husband is a minister?

Mrs. Gladhill: Yes.

The Court: All right. Have you had any other employment in the past years?

Mrs. Gladhill: I've worked in food service in the past several years in various ways. We were managers of a Christian Seminar Camp for the last 16 years.

The Court: All right.

Mr. Payton, you are from Hartford, Kansas?

Mr. Payton: Yes.

The Court: And you work for Iowa Beef Processing?

Mr. Payton: Yes.

The Court: How long have you been with them?

Mr. Payton: Ten years.

The Court: All right. And your wife is a housewife?

Mr. Payton: Yes, sir.

The Court: All right.

Now let me ask all of you generally, but let me first introduce to you, I believe you heard the names of the attorneys, but at the first table is Mr. Gene Schroer and with him is his partner. Let me find out from you, have any of you had any law business with Mr. Schroer or are you personally related to him or to Mr. Wulz? Any relationship there? He is a practicing attorney here in Topeka and I want to find out if any of you have had any law business with him?

(Reporter's Note: No audible response.)

The Court: Mr. Schroer, would you introduce the people with you, please.

Mr. Schroer: Yes; next to me is Freda Greenwood, the mother of Billy Greenwood, and her husband Mr. John Greenwood.

The Court: Let me ascertain are any of you acquainted with the Greenwoods; any of you related to them in any connection there at all? That might be important to the Court one way or another.

(Reporter's Note: No audible response.)

The Court: Over at the other table is Mr. Patterson and his partner. They practice also here in Topeka, Kansas. Let me find out have any of you had any law business with Mr. Patterson? Have you any relationship to Mr. Patterson or his partner?

(Reporter's Note: No audible response.)

The Court: Mr. Patterson, would you introduce the gentleman with you?

Mr. Patterson: Assisting me in trial is Mr. Fabert, and the next gentleman down is Clifford Boyleston. Mr. Boyleston is an engineer with McDonough and lives near McDonough, Georgia. McDonough is about 35 miles out of Atlanta. And to his left is Mr. John Ulmer, who is legal counsel for the McDonough office and part of the administrative staff of McDonough.

The Court: Now, I think it would be very remote, but now that I have learned how to pronounce the name of that company, the McDonough Company, it's a corporation. Let me find out have any of you had any relationship at all with this corporation for example, as a stockholder, an employee or any relationship at all with this corporation?

(Reporter's Note: No audible response.)

The Court: All right. Now, let me find out have any of you served as a juror in a criminal or a civil case or as a member of a Grand Jury, federal Grand Jury in a criminal case? Any of you had any experience serving as jurors? If so would you raise your hands.

(Reporter's Note: No response.)

The Court: Let me also ascertain have you heard anything at all about this case? Do you have any information about the facts of the case over and above what the Court has revealed to you at this time?

(Reporter's Note: No audible response.)

The Court: And from what you have heard, have any of you formed any opinion at all about the case?

(Reporter's Note: No audible response.)

The Court: Now, recognizing that we are looking for six jurors here who will decide the case based solely on the evidence as they hear it from the witness stand and the instructions on the law as given to you by the Court, do any of you at this time have any opinion about the case whatsoever?

(Reporter's Note: No audible response.)

The Court: Let me ask you this question: If you were Mr. Schroer presenting this case for the plaintiff would you be satisfied to present the case to a juror in your frame of mind right at this point?

(Reporter's Note: No audible response.)

The Court: On the other hand if you were Mr. Patterson who is going to be handling the defense of this case would you be satisfied to submit the case to a juror in your frame of mind at this time?

(Reporter's Note: No audible response.)

The Court: Now, let me also ascertain from you, I told you about the schedule and I hope that we would finish this case by next week, but any of you that would have a serious problem with the schedule such as I have

just outlined to you? If so, we—we don't want anyone that would be in a very bad position and feel like they needed to conclude this case rapidly. That is what I am trying to find out.

Mr. Frauenfelder: I'd like to be gone the 18th. I work for the farm with sheep and we have got that ram sale in Hutchinson the 18th.

The Court: Does that cause us any problem, gentlemen?

Mr. Schroer: That is Thursday I believe.

Mr. Patterson: That is a Friday. And it will be close.

The Court: Would you feel more comfortable if we allowed you to step down?

Mr. Frauenfelder: I sure would.

The Court: We might meet that deadline, but it might cause some problems. I believe Mr. Frauenfelder, I'll allow you to step down. We'll call another juror. You will eventually be called back, but this case might run us very close to your schedule there so you may step down.

Mr. Clerk, will you call another juror?

The Clerk: Joy Wendt.

The Court: Mrs. Wendt, you are from Topeka and you are an executive secretary for the First National Bank; is that correct?

Mrs. Wendt: That's correct.

The Court: And your husband works for Southwestern Bell?

Mrs. Wendt: That's correct.

The Court: All right. Now, I have just given the schedule to the other jurors here, but I haven't had a chance to—would you be able to meet this schedule if—it doesn't cause you any particular problem?

Mrs. Wendt: No:

The Court: All right, fine. Then in regard to the other questions that I have been asking here have you ever served as a juror?

Mrs. Wendt: No, I have not.

The Court: Do you know any of the parties or the attorneys, have any relationship with them at all?

Mrs. Wendt: No.

The Court: And I have asked other questions here which had to do with any relationship with this corporation at all. You have no problems there?

Mrs. Wendt: No.

The Court: I assume you are not a stockholder of this corporation or—

Mrs. Wendt: No, I am not.

The Court: —or have any relationship there at all? Let me ask you generally, do you know of any reason if you would be selected to serve as a juror you could not serve and be completely fair and impartial in this case? Any problem at all that you see?

Mrs. Wendt: No problems.

The Court: All right.

I believe I am now ready to ask the attorneys to inquire.

Mr. Schroer, would you like to inquire first?

If you wish to move the lectern around there do that, if you are strong enough.

Mr. Schroer: May it please the Court.

The Court: Mr. Schroer.

Mr. Schroer: Counsel, ladies and gentlemen, I will try to ask most of the questions to you all generally so that we can save time and not have to run down a long list. I don't want to repeat any of the questions in areas that the judge covered, but I think there are a few things that because of the importance of this case that I would like to get into.

Let me first state that practicing law with me are some other individuals, Frank Rice, John Bryan, Dan Lykins, Danton Hejtmanek, Joe Patton.

Now the Judge asked you if you had any business with our firm. I'd like to expand on that and ask if any of you have either done business with any members of our firm or know any of us personally that it might affect your ability to be comfortable in deciding this case?

(Reporter's Note: No audible response.)

Mr. Schroer: If any of you feel that it is a question in your mind would you please raise your hand; otherwise I'll assume not.

(Reporter's Note: No response.)

Mr. Schroer: I next would like to ask Mr. Patterson to mention the various members of his firm so that I might ask one of you a question.

Mr. Patterson: You want me to go down the list?

Mr. Schroer: Yes.

Mr. Patterson: David Fisher, myself, Keith Sayler, Dudley Smith, Larry Pepperdine, Jim Nordstrom, J. B. King, Steve Pigg and Steve Fabert who is with me.

Mr. Schroer: Now, do any of you know any of those gentlemen personally or have done any business with any members of that firm at any time?

(Reporter's Note: No response.)

Mr. Schroer: Again if so, please raise your hand.

(Reporter's Note: No audible response.)

Mr. Schroer: I see no hands raised so I assume that I have—you have no knowledge or acquaintance with any of those attorneys.

Now, the Judge asked you about facts of the accident. There were several newspaper articles about four years ago. This accident occurred at Cullen Village out just south of town and involved loss of both feet to young Mr. Billy Greenwood. Do any of you remember anything about a lawn mower accident and anything in the papers about the facts of that accident occurring about four years ago? That is the Topeka Daily Capital I am speaking of.

(Reporter's Note: No response.)

Mr. Schroer: If so, would you please raise your hand.

Mrs. Wendt: I remember only the facts that you stated, but I do remember reading about it.

Mr. Schroer: Mrs. Wendt, you do remember then that the event occurred?

Mrs. Wendt: Yes, I do.

Mr. Schroer: Do you remember any other facts other than what I have stated?

Mrs. Wendt: No, I remember a child being hurt in a lawn mower accident. And when you said "Cullen Village" I remember that that brought that to mind.

Mr. Schroer: I assume you have no impressions from that newspaper article other than just the facts that we have talked about?

Mrs. Wendt: That is exactly right.

Mr. Schroer: Thank you.

Now, I'd like to ask you whether or not any of you have had court litigation yourselves or any members of your immediate family have been involved either as a plaintiff or a defendant or in some way been inside a courtroom for business purposes? If it was a member of the family I am only interested in whether or not it might have given you some impressions or some feelings or attitude about the system. Therefore, how many of you have either been to a lawyer over a legal matter or either been sued or sued someone else or been to Court at anytime?

Would you raise your hands.

(Reporter's Note: Response.)

Mr. Schroer: Let me just ask the back row first. Would you raise your hands?

(Reporter's Note: Response.)

Mr. Schroer: Five in the back row. Thank you.

And the front row?

(Reporter's Note: Response.)

Mr. Schroer: Three in the front row. Thank you.

Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family?

I'll ask you to raise your hands? Back row first.

(Reporter's Note: No response.)

Mr. Schroer: I see no hands raised in the back row.

Front row?

Mr. Cook: "Response."

Mr. Schroer: One in the front row.

My next question I would like to ask you all generally deals with your attitude toward the system that we have in this country, in this state, the Court touched upon it, and that is the rights of the parties to come to Court to have their differences settled, to have their cases heard, to bring the case and to defend the case, the system that has a judge to instruct on the law and the system that allows jurors to decide the facts. Are there any of you that have any philosophies, political, or ideological, or psychological who in any way doesn't believe that this is

a good system or doesn't believe we should have this system of justice or doesn't believe that this is the way disputes should be settled or doesn't like the idea of Court cases and juries deciding differences between people?

(Reporter's Note: No response.)

Mr. Schroer: Are there any of you that do not believe in the jury system, and do not believe in the system of justice that we have in this great country or have any reservations about it in the sense that people shouldn't seek money damages for injuries caused by other people?

(Reporter's Note: No response.)

Mr. Schroer: Are there any of you that have any questions, or doubts or philosophies that would keep you from being a—the kind of juror and impartial juror that both sides want? If so, would you please raise your hand.

(Reporter's Note: No response.)

Mr. Schroer: Again I see no hands raised.

I thank you.

Now, I touched upon damages in my last question, but in wanting fair and impartial jurors in the case, the case here involves severe damages and a claim of award which will involve a great deal of money. Billy Greenwood is seeking a large amount of damages for the injuries that he believes were caused by the defendant. No one in the courtroom wants a juror at this time who has made up their mind with regard to anybody is not entitled to recover or recover anything, but just because a large amount of money is being sought for the injuries of this boy are there any of you that have any philosophy again that says,

"Even if proven I wouldn't award damages in a large amount. Even if they are proven to me I still couldn't give or award or compensate the injured person in terms of hundreds of thousands of dollars if it was proven to me." Are there any of you that believe that no damages or only a small amount of damages should be awarded to people who are injured?

(Reporter's Note: No response.)

Mr. Schroer: That is kind of a long question. I hope it is clear. Are there any of you that have that kind of attitude now before the case even starts that only a small amount of damages or no damages should be awarded if proven, even if they are proven? Are there any of you that have that attitude? Would you please raise your hand?

(Reporter's Note: No response.)

Mr. Schroer: Thank you.

Mr. Barnhill, do you have any particular attitude about claims, and accidents and injuries that are in any way the result of your wife's work, or occupation or profession?

Mr. Barnhill: No.

The Court: I assume that some of her profession deals with cases, or claims or injuries of some kind?

Mr. Barnhill: That is correct.

Mr. Schroer: Do you think you could be, despite that, just as good a juror for the plaintiff or just as fair-minded for the plaintiff's claim as though your wife was in some other field or endeavor?

Mr. Barnhill: I do.

Mr. Schroer: You understand the nature of my question and my concern about it?

Mr. Barnhill: That's correct.

Mr. Schroer: You understand there are some people that might not be naturally objective about lawsuits based on their employment, but you think you could be?

Mr. Barnhill: Yes.

Mr. Schroer: And you know of no reason why you couldn't award full compensation to Billy Greenwood if you found he is entitled to it?

Mr. Barnhill: That is correct.

Mr. Schroer: You believe that you could?

Mr. Barnhill: Yes.

Mr. Schroer: Do you have any questions in your mind at all about that?

Mr. Barnhill: No.

Mr. Schroer: Or any of the other question I asked?

Mr. Barnhill: No.

Mr. Schroer: Let me ask all of you, are any of you hard of hearing that would have any difficulty hearing the evidence?

Mr. Cook: A certain amount.

Mr. Schroer: Mr. Cook, you are hard of hearing?

Mr. Cook: A certain per cent on certain levels.

Mr. Schroer: Let me ask you if you are allowed to sit in this case do you think you could hear better if you were allowed to sit in a position closest to the witness box?

Mr. Cook: It is just some sounds I can't hear. It's from being around heavy equipment.

The Court: Can you hear the questions Mr. Schroer is asking you?

Mr. Cook: Yes.

Mr. Schroer: Can you hear me all right?

Mr. Cook: Yes.

Mr. Schroer: Can you hear me now?

Mr. Cook: Yes.

Mr. Schroer: Is it certain tones or certain words?

Mr. Cook: Yes: certain tones.

Mr. Schroer: Do you think it would affect your ability to hear all the evidence or would it be a word now and then or what that would bother—

Mr. Cook: No, I wouldn't.

Mr. Schroer: You think you could still hear well enough to be a juror?

Mr. Cook: Yes, sir.

The Court: Let me just say to the jurors, anytime you cannot hear put up your hand, and let me know, and I'll make them speak up and I'll be after them all the time anyway, but if anytime you cannot hear please put up your hand.

Mr. Schroer: Thank you, Your Honor.

Mr. Barnhill, have any of your children ever been injured while growing up in any serious way?

Mr. Barnhill: No.

Mr. Schroer: Did you live in the city all the time they were growing up?

Mr. Barnhill: Yes.

Mr. Schroer: You operate a lawn mower either walk behind or riding lawn mower?

Mr. Barnhill.: Riding.

Mr. Schroeder: You have a riding lawn mower?

Mr. Barnhill: Yes.

Mr. Schroer: Let me ask all of you, do any of you own a McDonough Snapper riding lawn mower?

(Reporter's Note: No response.)

Mr. Schroer: Or a McDonough walk behind lawn mower?

(Reporter's Note: No response.)

Mr. Schroer: Again I see no hands raised.

Do you operate the mower yourself?

Mr. Barnhill: Yes.

Mr. Schroer: Any of your children operate the mower?

Mr. Barnhill: Well, I've got a riding mower and then I've got a push mower and they use the push mower.

Mr. Schroer: You cut the grass yourself?

Mr. Barnhill: Yes, most of the time.

Mr. Schroer: How old are your children?

Mr. Barnhill: My oldest is 21, and I've got one 20, and one 18 and one will be, I believe, 12.

Mr. Schroer: Have any of your children driven the riding lawn mower, cut the grass with the riding lawn mower?

Mr. Barnhill: Yes.

Mr. Schroer: Do you have a fence in your yard or an open yard?

Mr. Barnhill: Open.

Mr. Schroer: Thank you, sir.

Carolyn Engert; is it?

Mrs. Engert: That's right.

Mr. Schroer: Have you done any other kind of work other than been a lab technician?

Mrs. Engert: I was receptionist insurance clerk at the medical laboratory.

Mr. Schroer: Are your children with you?

Mrs. Engert: One is.

Mr. Schroer: What age?

Mrs. Engert: She's 15.

Mr. Schroer: And your other children? Older or younger?

Mrs. Engert: Older.

Mr. Schroer: Have you ever been around a riding lawn mower?

Mrs. Engert: Yes, I have.

Mr. Schroer: Operated it yourself?

Mrs. Engert: Yes.

Mr. Schroer: How? At what age? After marriage?

Mrs. Engert: Yes.

Mr. Schroer: Or while you were a loung lady?

Mrs. Engert: While I was married.

Mr. Schroer: Your husband or children operate the mower too?

Mrs. Engert: My husband occasionally. I used it most of the time.

Mr. Schroer: You did most of the time?

Mrs. Engert: That's right.

Mr. Schroer: And the children ever operate the mower?

Mrs. Engert: No.

Mr. Schroer: What ages were they when you were with him and had the mower?

Mrs. Engert: Oh, starting out probably 5 through 15—make that 5 through 18.

Mr. Schroer: You are saying even at the age of 17, 18, 15—I don't know whether they are boys or girls.

Mrs. Engert: All girls.

Mr. Schroer: Did you not have them operate the mower because it wasn't convenient or did you have any hesitancy about it?

Mrs. Engert: I was hesitant about it. We had a very sloping yard and I was hesitant about it.

Mr. Schroer: The fact they were girls had something to do with it too?

Mrs. Engert: No.

Mr. Schroer: Mrs. Murray, have you operated a riding lawn mower yourself?

Mrs. Murray: No, I haven't. I've been around them, but I haven't ever operated one.

Mr. Schroer: Do you have one at the present?

Mrs. Murray: Well, we have a push mower and I have mowed the yard with it.

Mr. Schroer: You know the difference between a riding and a push mower?

Mrs. Murray: Yes.

Mr. Schroer: Have you had any riding mower?

Mrs. Murray: No, my brother-in-law has one.

Mr. Schroer: So you have never operated a riding mower yourself?

Mrs. Murray: No.

Mr. Schroer: Have you operated the walk behind?

Mrs. Murray: Yes.

Mr. Schroer: And your children are obviously at various ages?

Mrs. Murray: I have a 14-year old son, and a 13-year old daughter, and an 8-year old daughter and a 6-year old boy.

Mr. Schroer: Thank you.

Mrs. Wendt, are you in a certain department at the bank?

Mrs. Wendt: Yes.

Mr. Schroer: What department is that?

Mrs. Wendt: I work for Tom Clevenger.

Mr. Schroer: President of the bank?

Mrs. Wendt: Yes.

Mr. Schroer: Are you his executive secretary?

Mrs. Wendt: That's right.

Mr. Schroer: Or personal secretary or what? What type of work does your husband do at Southwestern Bell?

Mrs. Wendt: He's in the engineering department.

Mr. Schroer: Is he a licensed or graduate engineer?

Mrs. Wendt: No, he is not.

Mr. Schroer: What is he, more in the drafting, planning or drawing?

Mrs. Wendt: His schooling was on-the-job training, but he's in switch engineering.

Mr. Schroer: Switch engineering?

Mrs. Wendt: Yes.

Mr. Schroer: I won't ask what that is.

Mrs. Wendt: Please don't.

Mr. Schroer: Has he been with them a long time?

Mrs. Wendt: Almost 25 years.

Mr. Schroer: Do you and your husband have a riding lawn mower?

Mrs. Wendt: No, we don't.

Mr. Schroer: Have you ever been around them?

Mrs. Wendt: No, I haven't.

Mr. Schroer: Ever operated them?

Mrs. Wendt: No, I haven't.

Mr. Schroer: Thank you.

Mr. Hillard?

Mr. Hillard: That's correct.

Mr. Schroer: Let me ask you about your experience with riding mowers. Have you had any?

Mr. Hillard: I have ridden on one one time.

Mr. Schroer: Do you have a walk behind?

Mr. Hillard: No, we don't.

Mr. Schroer: Do you live in an apartment?

Mr. Hillard: We just moved in a new house in December and our yard isn't planted yet.

Mr. Schroer: How about in previous years, have you cut your own yard?

Mr. Hillard: Yes.

Mr. Schroer: What with?

Mr. Hillard: A push mower.

Mr. Schroer: Never operated a riding mower?

Mr. Hillard: One time.

Mr. Schroer: Well, I meant except for that one time?

Mr. Hillard: No.

Mr. Schroer: Thank you, sir.

Miss Duke, what has been your experience with riding lawn mowers?

Miss Duke: Never operated one.

Mr. Schroer: Have you been around any of them?

Miss Duke: No.

Mr. Schroer: Have you ever operated the walk behind?

Miss Duke: Yes, I have.

Mr. Schroer: Did you cut the grass quite a bit or a little bit?

Miss Duke: I helped my father when I was younger.

Mr. Schroer: Regularly or occasionally?

Miss Duke: Occasionally.

Mr. Schroer: Did you then live with your parents you mean, when this happened?

Miss Duke: Yes.

Mr. Schroer: Did you have a big yard or little yard?

Miss Duke: Yes, big yard.

Mr. Schroer: Your father is a circuit designer of some kind?

Miss Duke: Right.

Mr. Schroer: What is that?

Miss Duke: Santa Fe.

Mr. Schroer: What is that?

Miss Duke: The signals on train relays, he helps design them.

Mr. Schroer: Do you have any younger brothers and sisters?

Miss Duke: Yes, I do.

Mr. Schroer: What age range?

Miss Duke: I have a sister 20 and a sister 16.

Mr. Schroer: You have heard all these questions I have asked everyone else? Is there any question in your mind about your ability to be a fair and impartial juror?

Miss Duke: No, sir.

Mr. Schroer: Do you feel good about the possibility of sitting on a jury or do you sort of dread it a little bit?

Miss Duke: I feel fine.

Mr. Schroer: Are you looking forward to it or—if you are chosen or are you hoping you won't be?

Miss Duke: I feel fine about it.

Mr. Schroer: Thank you. Have you held various kinds of jobs or employment while growing up?

Miss Duke: I've held three jobs.

Mr. Schroer: What kind?

Miss Duke: I was a manager of a Kwik-Shop for three years. Then I worked for the federal government for a year and a half and then I worked for Frito-Lay.

Mr. Schroer: What kind of work do you do for Frito-Lay?

Miss Duke: I'm a data entry operator.

Mr. Schroer: Data—

Miss Duke: Data entry operator.

Mr. Schroer: Machines then?

Miss Duke: Yes.

Mr. Schroer: And for the federal government what did you do?

Miss Duke: I was a secretary.

Mr. Schoer: Thank you. You replied and raised your hand with regard to being involved or having someone in your immediate family involved in some claim or--

Miss Duke: Myself.

Mr. Schroer: What kind was that?

Miss Duke: It was a landlord.

Mr. Schroer: Did you go to court?

Miss Duke: Yes.

Mr. Schroer: Did he take it to court or did you?

Miss Duke: He did.

Mr. Schroer: Did you actually have a trial?

Miss Duke: No.

Mr. Schroer: Was it settled?

Miss Duke: Yes.

Mr. Schroer: In some way?

Miss Duke: Yes.

Mr. Schroer: Did that experience cause you any good or bad feelings about the system of courts and justice?

Miss Duke: No.

Mr. Schroer: You feel reasonably good about the system then as it is?

Miss Duke: Yes.

Mr. Schroer: I believe I neglected to ask you Mrs. Wendt, did you also raise your hand on that question?

Mrs. Wendt: That I had been to court?

Mr. Schroer: Yes.

Mrs. Wendt: Yes, I was a witness in a divorce trial.

Mr. Schroer: Is that the only occasion?

Mrs. Wendt: That is the only occasion.

Mr. Schroer: Several years ago?

Mrs. Wendt: Yes, it has been.

Mr. Schroer: Did that divorce involve someone who was very close?

Mrs. Wendt: Yes, it was my sister.

Mr. Schroer: Did that court decision—however I won't ask you about that—did that cause you to feel any bitterness or dislike for the way the courts are run or how the case was decided?

Mrs. Wendt: No, it did not.

Mr. Schroer: So it therefore wouldn't affect your attitude toward the courts at this time?

Mrs. Wendt: No, it would not.

Mr. Schroer: Mrs. Murray, I believe I forgot to ask you the same question. What was your experience?

Mrs. Murray: Well, I just have filed charges against a former company I worked for for wages that I didn't receive.

Mr. Schroer: It is nothing has happened yet?

Mrs. Murray: No.

Mr. Schroer: So then would that affect you one way or another so far as your attitude towards the courts?

Mrs. Murray: No.

Mr. Schroer: Are you represented by an attorney in that?

Mrs. Murray: Yes.

Mr. Schroer: But it is none of the attorneys named in the earlier discussion?

Mrs. Murray: No.

Mr. Schroer: Thank you.

And Mrs. Engert, what was your reason for raising your hand on that question?

Mrs. Engert: It was my divorce. And then a very long time ago I was involved in an automobile accident and someone was fatally injured. I was not driving, I was a passenger in the car. And charges were brought against the driver.

Mr. Schroer: Did you go to court in that experience?

Mrs. Engert: It was done in a preliminary hearing to determine whether or not a fair trial in the City of Manhattan—

Mr. Schroer: Did that cause you to get any permanent attitude towards the system of justice?

Mrs. Engert: No.

Mr. Schroer: Either one way or another?

Mrs. Engert: No.

Mr. Schroer: That is the only occasion?

Mrs. Engert: Yes.

Mr. Schroer: Mr. Barnhill, what was yours?

Mr. Barnhill: A divorce.

Mr. Schroer: Anything else?

Mr. Barnhill: No.

Mr. Schroer: Thank you.

Mrs. Finnigan, are you around a great deal of pain and suffering in your work?

Mrs. Finnigan: I have been, yes.

Mr. Schroer: Does that get to you in any way personally when you see a lot of it?

Mrs. Finnigan: No, well, there is a certain amount that gets to anybody, but you have to learn that people go through this pain and you just help them as best you can. You can't take it home with you.

Mr. Schroer: In this case the jury will be asked to assess damages for the amount of pain and suffering to Billy Greenwood. Do you suppose being around so much pain you might be immune and less sensitive to judging that pain than someone who hadn't been around so many people who were sick or injured?

Mrs. Finnigan: No, I don't think so.

Mr. Schroer: Do you think you still could and would you try to objectively judge the amount of his pain and suffering?

Mrs. Finnigan: Yes.

Mr. Schroer: If the Judge asked you to in the instructions?

Mrs. Finnigan: Yes.

Mr. Schroer: And you would try to do that; would you?

Mrs. Finnigan: Definitely. People have always said that I've always been very objective about things, give an honest opinion.

Mr. Schroer: That is what we want is an objective juror. Have you had children of your own?

Mrs. Finnigan: Yes, I have two.

Mr. Schroer: Grown?

Mrs. Finnigan: Grown daughters.

Mr. Schroer: Have you ever been around riding lawn mowers?

Mrs. Finnigan: My husband has one. We call it his "toy."

Mr. Schroer: You don't operate it?

Mrs. Finnigan: No.

Mr. Schroer: You have heard all these questions that we have been asking. Do you understand that myself, and the Judge and other counsel are trying to select the six most impartial persons to try this case?

Mrs. Finnigan: Yes.

Mr. Schroer: Do you feel you could be one of those?

Mrs. Finnigan: Yes, I do.

Mr. Schroer: Would you drive back and forth to—what is it, Frankfort?

Mrs. Finnigan: I think I'd stay with my daughter in Eudora.

Mr. Schroer: And not make a trip every day?

Mrs. Finnigan: No.

Mr. Schroer: Thank you.

Mrs. Roose, what do you do in your work?

Mrs. Roose: I'm an area supervisor, supervise other sales people.

Mr. Schroer: I'm sorry. Maybe I'm hard of hearing.

Mrs. Roose: I supervise the other sales people in an area in the store, department store.

Mr. Schroer: Do you and your husband have a riding lawn mower?

Mrs. Roose: No, we don't.

Mr. Schroer: Have you ever operated one?

Mrs. Roose: No, I haven't.

Mr. Schroer: Do you have a walk behind lawn mower?

Mrs. Roose: Yes.

Mr. Schroer: Who cuts the grass?

Mrs. Roose: About half and half.

Mr. Schroer: How old are your children?

Mrs. Roose: 20 and 23.

The Court: Did they cut the yard when they were growing up as teenagers?

Mrs. Roose: Yes.

Mr. Schroer: What ages?

Mrs. Roose: I suppose 10 or 12 on up.

Mr. Schroer: You said that you had some matter involved in court or lawyers.

Mrs. Roose: It was a divorce.

Mr. Schroer: Anything other than that?

Mrs. Roose: No.

Mr. Schroer: Mr. Cook, you indicated also that you had been involved or someone of your family in some claim or case.

Mr. Cook: Well, I've been a witness in a divorce court.

Mr. Schroer: I should have said other than divorce.

Mr. Cook: And my wife has got a pending deal right now. It isn't in court or anything.

Mr. Schroer: What kind of a deal?

Mr. Cook: She got tendonitis in her hand.

Mr. Schroer: Is it a Workmens' Compensation claim or something like that? It was at work?

Mr. Cook: Yes.

Mr. Schroer: Is it a Workmens' Compensation claim?

Mr. Cook: Yes. She is working now. She has been at it for a year and she is still under a doctor's care.

Mr. Schroer: It is a permanent injury to the hand?

Mr. Cook: A certain amount, yes.

Mr. Schroer: Even though she is back at work?

Mr. Cook: Yes.

Mr. Schroer: Is she being represented by an attorney in that?

Mr. Cook: No.

Mr. Schroer: She is just trying to handle it herself?

Mr. Cook: Well, the doctor hasn't ever released her or anything.

Mr. Schroer: That you understand is totally different than this case?

Mr. Cook: Yes.

Mr. Schroer: It doesn't have anything to do with it?

Mr. Cook: Yes.

Mr. Schroer: And I assume it doesn't in your mind as far as being a fair juror?

Mr. Cook: Yes.

Mr. Schroer: Did you also raise your hand with regard to injury? Would that have been the same thing or was that different?

Mr. Cook: She got hurt out at Iowa Beef several years ago.

Mr. Schroer: Was that a claim for Workmens' Compensation matter there?

Mr. Cook: Workmens' Comp.

Mr. Schroer: Is that anything that would bother you in hearing of this case?

Mr. Cook: No.

Mr. Schroer: You have never been injured on the job?

Mr. Cook: Yes, I have.

Mr. Schroer: What kind of injuries did you have?

Mr. Cook: I got hit in the forehead about three years ago.

Mr. Schroer: Are you okay? Did it cause you any permanent disability of any kind?

Mr. Cook: No, I was just off a day with it.

Mr. Schroer: You heard the kind of questions I asked the other people about the belief in the system of justice we have?

Mr. Cook: Yes.

Mr. Schroer: Are you one of those people that believe in it, that it is the best in the world?

Mr. Cook: Yes.

Mr. Schroer: It may not be perfect, but it is the best in the world; is that right?

Mr. Cook: Yes.

Mr. Schroer: All right. Thank you. Do you think that if you sat close to the witness box it would enable you to hear better?

Mr. Cook: I can hear most things okay.

Mr. Schroer: And you will raise your hand if you don't hear something?

Mr. Cook: Yes.

Mr. Schroer: Mr. Kerns, you work for a company that makes tool and die sets?

Mr. Kerns: Yes.

Mr. Schroer: A manufacturing concern?

Mr. Kerns: Yes.

Mr. Schroer: Since this is a lawsuit involving a case against a manufacturing concern, do you think you have any natural sympathy for the manufacturer in a case like this?

Mr. Kerns: No.

Mr. Schroer: Do you understand this is the kind of case that sometimes is called a "products liability case?"

Mr. Kerns: Right.

Mr. Schroer: Do you believe that manufacturers should be responsible for making safe products?

Mr. Kerns: Yes, within reason.

Mr. Schroer: Within reason? Okay. That is fine. Do you feel that because you are in that business you might be a little more—you might lean a little bit toward a manufacturer since you are engaged in the manufacturing business than you would a young boy who claims to have been injured because of the defective product?

Mr. Kerns: No, I really don't think that would have anything to do with it.

Mr. Schroer: I mean sometimes it is hard for us to really know all the internal workings of our mind and our philosophy, but I know you read about products liability cases.

Mr. Kerns: I use products myself too, you know.

Mr. Schroer: You believe that the manufacturer has a duty to make the product as safe as possible?

Mr. Kerns: Within reasonable—reasonably so, yes.

Mr. Schroer: You don't feel that if you were selected as a juror that you would be automatically kind of in favor of the defendant because they are a manufacturer of a product?

Mr. Kerns: No.

Mr. Schroer: You consider yourself a consumer as well as a manufacturer?

Mr. Kerns: That's right.

Mr. Schroer: There have been a different kind of—a bunch of lawsuits involving the kind of heavy equip-

ment you make your stuff for I believe. Are you familiar with some of the areas of those lawsuits?

Mr. Kerns: Not really. I just know there have been some.

Mr. Schroer: Regarding double switching and distance of operators away from large presses and stuff like that?

Mr. Kerns: (Nods head)

Mr. Schroer: Were you aware of that generally?

Mr. Kerns: Yes.

Mr. Schroer: Although not specifically?

Mr. Kerns: Yes.

Mr. Schroer: Have you had any experience with a riding mower?

Mr. Kerns: I have used my father-in-law's and the neighbor's like when they are on trips to mow their yard or something like that. Otherwise mine is the kind you walk behind because I need the exercise.

Mr. Schroer: You don't own one?

Mr. Kerns: No.

Mr. Schroer: You have mentioned something about a claim, or a case or court appearance of some kind. Was that other than divorce?

Mr. Kerns: Yes; I worked as a loan officer in a bank for a number of years and there was a couple of instances we had to take somebody to court to collect a bad loan. Other than that, that is it.

Mr. Schroer: That is the only time?

Mr. Kerns: Yes.

Mr. Schroer: Thank you, sir.

Mrs. Gladhill, I was kind of asking the question about your attitude toward law courts and money damages generally, but I want to ask you about it personally. You are a minister's wife. What kind of church is your husband a minister in?

Mrs. Gladhill: The Latter Church of Christ.

Mr. Schroer: There are some particular moral attitudes that are inconsistent in some denominations that I am aware of, inconsistent with such things as money damages for injuries. Do you have any kind of moral attitude that would keep you from awarding a large amount of damages if the evidence proved it? Now you understand I don't want you to promise you will do it without the evidence, but if the evidence proved it, do you have any kind of philosophy or moral attitude in your church that you had personally that would keep you from awarding large damages to Billy if we prove he is entitled to them?

Mrs. Gladhill: No, sir.

Mr. Schroer: What kind of experience have you had with lawn mowers, riding or walk behind?

Mrs. Gladhill: My husband and I were managers of a summer camp for six years just prior to September of this last year and we mowed much of that with a riding mower.

Mr. Schroer: Used it there?

Mrs. Gladhill: Yes.

Mr. Schroer: Have you used it yourself?

Mrs. Gladhill: Yes.

Mr. Schroer: What age kids were in the summer camp?

Mrs. Gladhill: From fourth grade through high school.

Mr. Schroer: Some of the kids used the riding mower in camp, the bigger ones?

Mrs. Gladhill: No.

Mr. Schroer: You didn't let any of them?

Mrs. Gladhill: No.

Mr. Schroer: Have you lived in other cities other than Abilene?

Mrs. Gladhill: We don't live in town. We live in the country. We have lived in the country before we moved there.

Mr. Schroer: Have you lived in the country in other places then or in other cities?

Mrs. Gladhill: The last city we lived in was Manhattan when I was going to K-State about five years—five or six years ago.

Mr. Schroer: Have you ever worked outside the home?

Mrs. Gladhill: Yes; I worked on the food service at Marymount College.

Mr. Schroer: And did you finish college or almost complete college or—

Mrs. Gladhill: Graduated from K-State.

Mr. Schroer: From K-State? When?

Mrs. Gladhill: In 1975.

Mr. Schroer: What did you major in?

Mrs. Gladhill: Family and child development.

Mr. Schroer: What ages are your children?

Mrs. Gladhill: I have a boy is 2½ and a daughter 9 months.

Mr. Schroer: Thank you.

Mr. Payton, I didn't get clear in my mind—well, I shouldn't say that. Your wife is listed as a "housewife." Has she worked outside the home?

Mr. Payton: Not since the first kid.

Mr. Schroer: And how many children do you have?

Mr. Payton: Six.

Mr. Schroer: What is their range? I don't need—

Mr. Payton: Six to seventeen.

Mr. Schroer: Have you a power mower?

Mr. Payton: Yes; walk one.

Mr. Schroer: Have you ever had a riding mower?

Mr. Payton: No.

Mr. Schroer: Ever operate one?

Mr. Payton: No.

Mr. Patterson: I'm sorry, but I couldn't hear.

The Court: He said, "No" to both those questions.

Mr. Patterson: Thank you.

Mr. Schroer: Have you been a butcher for a number of years?

Mr. Payton: Ever since I got out of high school.

Mr. Schroer: And that is—can you tell me approximately how many years that is?

Mr. Payton: About 20.

Mr. Schroer: Did you ever work in a grocery store or always just for a packer?

Mr. Payton: Grocery store; packer.

Mr. Schroer: Both?

Mr. Payton: Yes.

Mr. Schroer: Now, I haven't—thank you, sir.

I haven't asked all of you the same questions. Let me ask you now, was there a question I asked somebody else that I didn't ask you that would have caused you to respond had the question been asked to you in some way that relates to information that we should know before Mr. Patterson and I with the help of the Court select the six to sit in the case? Was there any question I asked somebody else that raised the thought in your mind about your objectivity or that ought to be stated so that we'd know it as it affected some experience you had that might apply in this case? Any of you?

(Reporter's Note: No response.)

Mr. Schroer: Now, the Court will give you instructions and the facts will be presented from the witness stand and by evidence. Are there any of you that if you had some attitude on the law that is different from the judge's that can't put aside your own attitude on what the law is or ought to be and follow the judge's instructions even if they are different from what you thought they ought to be? Are there any of you that can't put aside your own ideas and follow the judge's instructions? If so, would you please raise your hand?

(Reporter's Note: No response.)

Mr. Schroer: Again I see no hands raised.

Saying that in another way, you are responsible to decide the facts and the judge is—and you've got to follow the law given you by the judge. Are there any of you that don't think you would be able to just decide the facts in this case from the witness stand and be objective and fair in deciding those facts? Please raise your hand.

(Reporter's Note: No response.)

Mr. Schroer: When I say "fair" I mean at this point being open-minded and not having anything influence you one way or another in favor of the plaintiff or against the plaintiff or in favor of the defendant or against the defendant before you have heard the evidence?

(Reporter's Note: No response.)

Mr. Schroer: Again I see no hands raised.

I pass the jury for cause, Your Honor.

The Court: Mr. Patterson?

Mr. Patterson: May it please the Court.

Ladies and gentlemen of the panel, I have a few questions that I would like to ask some of you as individuals and then I am going to ask all the questions collectively. In some cases I will ask for individual answers, so if you will bear with me I will proceed in that manner and hopefully we won't take too long.

Mrs. Wendt, maybe I missed it, but do you have any children?

Mrs. Wendt: Yes, we have two; a son, 21 and a daughter, 20.

Mr. Patterson: Did you use any kind of power mower while your children—do your children still live with you?

Mrs. Wendt: Yes. We have a mower that you push, and our son used it the majority of the time probably from age 10 until now.

Mr. Patterson: All right.

Mr. Hillard, I didn't get whether or not you had any children, sir.

Mr. Hillard: I have a daughter.

Mr. Schroer: And what is the daughter's age?

Mr. Hillard: She's 4.

Mr. Patterson: I don't suppose she uses a power mower?

Mr. Hillard: No, she hasn't.

Mr. Patterson: All right, sir.

Now Mrs. Finnigan.

Mrs. Finnigan: Yes.

Mr. Patterson: I heard your remark, and I don't want to misquote you, and I'm afraid I might, that somehow either your husband or your husband's friend in a kidding manner referred to the riding mower as a "toy."

Mrs. Finnigan: Our family.

Mr. Patterson: Is that—do you really regard it as a toy or is that kind of a jest?

Mrs. Finnigan: No. No, he wouldn't let the children out in the yard when he is using it, but he enjoys using his mower. We have a very nice looking yard.

Mr. Patterson: I take it then, and I want you to correct me if I'm wrong, but it might be referred to as a "toy" as far as your husband is concerned, but in jest?

Mrs. Finnigan: In jest, yes, sir.

Mr. Patterson: As kind of a joke?

Mrs. Finnigan: Yes.

Mr. Patterson: Now, some of these questions may have been asked in a little bit different manner, but I really want to come right to the point. Are there any among you who have ever yourselves, or your immediate family, or a neighbor, those three categories of persons, yourselves, anyone in your immediate family or a neighbor ever been injured by any kind of power mower?

(Reporter's Note: Response.)

Mr. Schroer: Mrs. Finnigan?

Mrs. Finnigan: My husband had a rock thrown out from under the mower and cut his foot.

Mr. Patterson: How long ago did that happen?

Mrs. Finnigan: About 20 years ago.

Mr. Patterson: Okay. Now, you understand, of course, that this is a suit brought by a small child against the manufacturer of a power mower. Is there anything about your husband's experience, the injury that he received from a power mower that would prevent you from being a fair and impartial juror in this case?

Mrs. Finnigan: No, 'cause there was a rock in the yard and any mower would have picked it up and thrown it. That is why he doesn't allow—didn't allow the children in the yard while he was mowing, because things can be thrown out from under them.

Mr. Patterson: All right. Thank you.

Now, although the defendant's name is McDonough Power Equipment Company, like most companies they have a trade name that represents a brand for their product. This company uses the name "Snapper brand," and it has been used for quite awhile. It is marketed nationwide. Now do any of you happen to use or know of anybody who uses this Snapper—a Snapper brand of mower or power equipment?

(Reporter's Note: Response.)

Mr. Patterson: Mr. Kerns?

Mr. Kerns: Yes.

Mr. Patterson: Okay. Could you tell me what your experience or what your acquaintance with the Snapper brand is?

Mr. Kerns: Well, just casual. One of the neighbors when I lived over in Missouri had one. I think it's the kind that my father has. He has a riding mower.

Mr. Patterson: Is there anything about either your neighbor's experience or your father's experience or your experience with them that would prevent you from being a fair and impartial juror to hear this case knowing that the defendant is the manufacturer of a Snapper brand product?

Mr. Kerns: No, not in the least.

Mr. Patterson: Now, are there any among you who either yourself, anyone in your immediate family or a neighbor ever had a child injured on any kind of a mechanical device or machinery? If so, could you raise your hand.

(Reporter's Note: Response.)

Mr. Patterson: Mr. Cook, you are—you have told us about your wife, but did you also have an experience involving a child?

Mr. Cook: My boy got his finger in a bike chain once, and when he was in high school he got his hand in a power saw.

Mr. Patterson: All right. And how old was your boy when he encountered the bike chain roughly? I don't need to know exactly.

Mr. Cook: I'd say about six.

Mr. Patterson: Okay. And the same question with respect to the power saw?

Mr. Cook: I'd say 13-15.

Mr. Patterson: Okay. And either of those instances, Mr. Cook, was there any kind of a claim made on behalf of your boy against the manufacturer or the seller of either the bike or the power saw?

Mr. Cook: No.

Mr. Patterson: Any kind of a lawsuit considered by you as a result of that experience?

Mr. Cook: No.

Mr. Patterson: Is there anything about your boy's experience that would prevent you from being a fair and impartial juror to hear this case knowing that it is an action brought by a child in behalf of a child against the manufacturer of a power mower?

Mr. Cook: No.

Mr. Patterson: Now, I notice that a number of you, either yourselves or someone in your immediate family pursue occupations that involve machinery either on a production line or in some other capacity. Are there any among you who either yourself, your immediate family, close friend or a neighbor have ever been injured on any kind of a machine whether it is at home or whether it is at work, at the factory or whatever? If so, would you please raise your hand.

(Reporter's Note: Response.)

Mr. Patterson: Mrs. Finnigan?

Mrs. Finnigan: When my husband was working one time he was cleaning out a machine, and put his hand

in it to clean it out, and somebody turned the machine on and it stripped the back of his hand off.

Mr. Patterson: Now how long ago did that happen?

Mrs. Finnigan: Oh, that's been a long time too. About 15 years.

Mr. Patterson: As a result of that experience was there any kind of a claim made by your husband against the manufacturer of the machine?

Mrs. Finnigan: Oh, no. No, it wasn't. It didn't have anything to do with the machine, it was a human error of somebody else.

Mr. Patterson: All right. Is there anything about that experience that would prevent you from being a fair and impartial juror to hear this case, again knowing generally the type of case it is?

Mrs. Finnigan: It is a different type of thing.

Mr. Patterson: Did I miss anybody else? Anybody who has either yourself, or immediate family, or close friend or neighbor ever been injured on any kind of machinery either at work, and the same question with respect to any kind of a mechanical device at home? That could include a lawn mower, snow blower, washer, dryer, stove? I'll skip over toys such as bicycles and roller skates. Anything?

(Reporter's Note: Response.)

Mr. Patterson: Mr. Cook?

Mr. Cook: My wife when she was young got her hand in a wringer washing machine.

Mr. Patterson: How long ago did that happen, sir?

Mr. Cook: I couldn't say. Before I ever knew her.

Mr. Patterson: Okay. Do you know whether or not your wife or anyone in her family or her behalf made any kind of claim against the seller of the machine or the manufacturer of the machine?

Mr. Cook: No, I don't.

Mr. Patterson: Is there anything about your wife's experience that would prevent you from being a fair and impartial juror to hear this kind of case, I mean a claim against the manufacturer of a mower?

Mr. Cook: No.

Mr. Patterson: Anybody else?

(Reporter's Note: No response.)

Mr. Patterson: Are there any among you who either yourself or in your immediate family has ever had the misfortune of having a severe injury or a death to a small child? If so, could you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: Mr. Cook, you told us about the bicycle and the power saw so we will miss (sic) that for the moment.

Anyone else? If so, could you raise your right hand, please?

(Reporter's Note: No response.)

Mr. Patterson: Are there any among you who have ever been a plaintiff, either yourself or anyone in your

immediate family ever been a plaintiff, that is the party who brings the legal action, or a defendant, that is the party against whom the action is brought, in any kind of suit involving bodily injury or death? Now that doesn't count domestic matters, just a claim for bodily injury or death? If so, could you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: The evidence that you will hear and see will consist of testimony from the witness chair at my immediate right, your left. Are there any—Mr. Cook, I believe you indicated you could hear. Can you hear me all right?

Mr. Cook: Yes.

Mr. Patterson: Is there anyone else who would anticipate having any difficulty in hearing the witness from the location that I have indicated? It would be to my right, your left. If so, could you raise your right hand.

(Reporter's Note: No response.)

Mr. Patterson: There will be some exhibits that will be passed among you that will involve, oh, printing about the size of a typewriter, possibly Pica type. I can't recall any that small, but I don't think any smaller than that. Also photographs. If any of you need glasses and forgot them are there any of you who don't have access to them? If so would you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: What I'm driving at, is there any—does anybody anticipate any problem in seeing and look-

ing at exhibits should you be called upon to look at it if it is passed to you?

(Reporter's Note: No response.)

Mr. Patterson: If so, would you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: Now, as you have probably been told, this is a contest between a small child and a corporation that manufactures products and sells them over a wide area. I am going to be very frank with you, this is a badly injured child. There is no guessing of that fact at all. This child had an accident and the result of which he has no right foot at all, there is an amputation above the ankle. His left foot is likewise not totally gone, but it is substantially gone. It is a bad injury and it occurred when he was only three years old. That is the plaintiff. The defendant is a manufacturing corporation.

Are there any among you who would have any difficulty in viewing, seeing and evaluating the evidence just as fair to one party as you would be to the other party? Would you have any such difficulty, Mr. Barnhill?

Mr. Barnhill: No.

Mr. Patterson: Mrs. Engert?

Mrs. Engert: No.

Mr. Patterson: Mrs. Murray?

Mrs. Murray: No.

Mr. Patterson: Mrs. Wendt?

Mrs. Wendt: No, I would not.

Mr. Patterson: Mr. Hillard?

Mr. Hillard: No.

Mr. Patterson: Mrs. (sic) Duke?

Miss Duke: No.

Mr. Patterson: Mr. Payton?

Mr. Payton: No.

Mr. Patterson: Mrs. Gladhill?

Mrs. Gladhill: No.

Mr. Patterson: Mr. Kerns?

Mr. Kerns: No.

Mr. Patterson: Mr. Cook?

Mr. Cook: No.

Mr. Patterson: Mrs. Roose?

Mrs. Roose: No.

Mr. Patterson: Mrs. Finnigan?

Mrs. Finnigan: No.

Mr. Patterson: If you should—well, at the close of the case and after you have heard all the evidence, the law that applies to it will be given to you by the Court. That is what we call "Instructions." They will be read to you and possibly they would be in writing and given to you. That is a matter for the discretion of the Court. I cannot exercise it for him. He will make that decision. But in any event, the law that applies to the case will be given to you by the Court, and you will hear it. Should you have occasion to read it you might find that the law

that applies to the case is different from what you thought the law either was or what you think the law ought to be. Now if you should find that to be the case are there any among you who would have any difficulty in putting aside your own notion as to what the law—what you think the law either is or ought to be and in following the instructions given to you by the Court.

Would you have any such difficulty, Mr. Barnhill?

Mr. Barnhill: No, sir.

Mr. Patterson: Mrs. Engert?

Mrs. Engert: No.

Mr. Patterson: Mrs. Murray?

Mrs. Murray: No.

Mr. Patterson: Mrs. Wendt?

Mrs. Wendt: No.

Mr. Patterson: Mr. Hillard?

Mr. Hillard: No.

Mr. Patterson: Mrs. (sic) Duke?

Miss Duke: No.

Mr. Patterson: Mr. Payton?

Mr. Payton: No.

Mr. Patterson: Mrs. Gladhill?

Mrs. Gladhill: No.

Mr. Patterson: Mr. Kerns?

Mr. Kerns: No.

Mr. Patterson: Mr. Cook?

Mr. Cook: No.

Mr. Patterson: Mrs. Roose?

Mrs. Roose: No.

Mr. Patterson: Mrs. Finnigan?

Mrs. Finnigan: No.

Mr. Patterson: Again, this case does involve an injury to a small child. At the conclusion of it you might have—we are all human. We can't help but have feelings for somebody as young as the plaintiff is as badly injured as he is. But should you find your sympathy that for someone who is badly injured would want to dictate one result, but the evidence as you really sit and hear it, and the law that applies to it would dictate another result are there any among you who would have any difficulty in returning a verdict that would be dictated by the evidence as you see it and hear it and the law that applies to the case should it be different than what your humanistic feelings might be?

Would you have any such problems, Mr. Barnhill?

Mr. Barnhill: No.

Mr. Patterson: Mrs. Engert?

Mrs. Engert: No.

Mr. Patterson: Mrs. Murray?

Mrs. Murray: No.

Mr. Patterson: Mrs. Wendt?

Mrs. Wendt: No.

Mr. Patterson: Mr. Hillard?

Mr. Hillard: No.

Mr. Patterson: Miss Duke?

Miss Duke: No.

Mr. Patterson: Mr. Payton?

Mr. Payton: No.

Mr. Patterson: Mrs. Gladhill?

Mrs. Gladhill: No.

Mr. Patterson: Mr. Kerns?

Mr. Kerns: No.

Mr. Patterson: Mr. Cook?

Mr. Cook: No.

Mr. Patterson: Mrs. Roose?

Mrs. Roose: No.

Mr. Patterson: Mrs. Finnigan?

Mrs. Finnigan: No.

The Court: Mr. Patterson, may I suggest that, I'm not trying to cut you off, but if you have any further questions please ask them to the panel as a group rather than individually. It takes a little less time and I'm sure they will understand and be able to answer.

Mr. Patterson: All right.

Are there any among you who have any feeling that a three-year old child who is injured on any kind of a machine automatically has a right to recover damages

against somebody regardless of any other evidence, regardless of any question of fault? Do any of you have any such feeling? Would you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: Are there any among you who have any feeling or opinion to the effect that the fact a suit is filed, that fact alone, without considering any other evidence, just the fact that a suit is filed is proof that the plaintiff has a right to recover? If so, would you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: One final question. I suspect plaintiff's counsel and myself between us have thought about every question that you could possibly think of to find out what there is possibly in your background that might prevent you from being a fair and impartial juror to hear this case. In case either of us have forgotten something, are there any among you who know of any reason, whether we have asked it or not, either Mr. Schroer or myself, do you know of any reason whether we have asked it or not that would prevent you from being a fair and impartial juror to hear this case, and knowing the kind of case it is, and who the parties are, who the counsel are? If so, would you raise your hand?

(Reporter's Note: No response.)

Mr. Patterson: The defendant passes for cause, Your Honor.

The Court: All right, gentlemen, I will now ask you to exercise your peremptory challenges.

Mr. Clerk, would you take care of that, please. Go to the plaintiff first.

Mr. Clerk, would you ask the jurors excused to step aside.

The Clerk: The following jurors have been excused. As I call your name, please step down from the jury box. Steve Hillard, Joy Wendt, Harvey Barnhill, Connie Gladhill, David Kerns, Ethelyn Roose.

Will the remaining jurors move to your right, to the far right, please.

The Court: You are now the six jurors who have been selected to try this case.

Mr. Clerk, would you now call four jurors and we will select two alternates. I will give each side one peremptory challenge.

CLERK'S MINUTE SHEET, PAGE 1

Rev. 6/71 Page 1 of 3

CLERK'S COURTROOM MINUTE SHEET—
CIVIL JURY—PART ONE

CASE NO. 77-4087

BILLY G. GREENWOOD, ET AL.

R. Daniel Lykins; Gene Schroer; Dan Wool (sic)
Counsel for Plaintiff

vs.

McDONOUGH POWER EQUIPMENT, INC.

Donald Patterson; Steve Fabert,
Counsel for Defendant

Judge ROGERS

Reporter INGRAM

Clerk GOMEZ

Date:	4-09-80	4-10-80	4-14-80	4-15-80	4-16-80
T/B	9:35 a.m.	9:10 a.m.	9:15 a.m.	9:40 a.m.	9:45 a.m.
T/E	4:15 p.m.	5:10 p.m.	5:10 p.m.	4:45 p.m.	4:55 p.m.

PROCEEDINGS

Jury impaneled and sworn: 4-09-80 At: 11:50 a.m.

	(Back Row)		(Front Row)
~~P-2~~	~~1 Harvey A. Barnhill~~		7 Marguenite J. Finnigan
	2 Carolyn S. Engert		
	3 Patricia S. Murray	D-2	~~8 Ethelyn L. Roose~~
P-3	~~Joy E. Wendt~~		9 Donald E. Cook
	~~4 Max N. Frauenfelder~~	P-1	~~David S. Kerns~~
D-3	~~5 Steve L. Hillard~~		~~10 Albert J. Elser~~
	6 Diane Marie Duke	D-1	~~11 Connie S. Gladhill~~
			12 Ronald R. Payton

SPECIAL VERDICT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 77-4087

BILLY G. GREENWOOD,

Plaintiff,

vs.

McDONOUGH POWER EQUIPMENT, INC.,

Defendant.

V E R D I C T

(Filed April 8 (sic), 1980)

We, the jury, duly empaneled and sworn, upon our oaths, present the following answers to the questions submitted by the Court:

(1) We find defendant:

— at fault)
) on the theory of strict
√ not at fault) liability
(check one)

(2) We find Jeffrey Morriss:

√ at fault)
) on the theory of negligence
— not at fault)
(check one)

(3) We find Ira Morriss:

√ at fault)
) on the theory of negligence
— not at fault)
(check one)

(4) We find Freda Greenwood:

√ at fault)
) on the theory of negligence
— not at fault)
(check one)

(5) Considering the contributions of all parties found liable in the above questions at one hundred percent (100%), we find the following percentages of the total fault attributable as follows:

Defendant	0% (0%-100%)
Jeffrey Morriss	20% (0%-100%)
Ira Morriss	45% (0%-100%)
Freda Greenwood	35% (0%-100%)
TOTAL	100%

(Note: as to any party listed above, if you find no fault and so indicate in any of questions 1 through 4, enter no percentage in the appropriate space above. If you do not find any party at fault, the total must equal zero percent.)

(6) Without considering the answers to the above questions, what total amount of damages do you find was sustained by plaintiff Billy G. Greenwood?

$375,000

/s/ Ronald R. Payton
Foreman

4/24/80
Date

(Caption Omitted)

PLAINTIFF'S MOTION TO APPROACH JURORS

COMES NOW the plaintiff, pursuant to U. S. D. C. Rule 23A and moves the Court for an Order authorizing counsel for plaintiff to approach the jurors regarding the following matters:

1. Any and all extrinsic matters considered, if any.

2. To inquire if any alternate jurors communicated with the jury during their deliberations.

3. To inquire if the jurors read any newspaper articles which appeared.

4. To inquire if any of the jurors formed or expressed any opinion before the case was submitted to them.

5. To inquire if the jurors overheard and considered any conferences at the bench between court and counsel.

6. To inquire if the jurors overheard and considered any conversations among defense counsel and their expert witnesses while in the hallway, especially as some of the jurors sat at the back of the courtroom during recess while the court attended to matters in criminal cases.

7. To inquire if the jurors faithfully adhered to the admonitions given them by the Court.

8. To inquire if the jurors truthfully answered questions on voir dire.

In support of this Motion, plaintiff shows to the Court:

1. The attached affidavit of John G. Greenwood.

2. The attached affidavit of Nancy L. Cooke.

3. That an alternate juror, Gary L. McDowell, contacted the Court, counsel for the defendant, and Mr. Greenwood at the close of the evidence.

4. That plaintiffs are of information and belief that the jury foreman's, Ronald R. Payton, wife was present during portions of the trial and plaintiffs would therefore request an opportunity to inquire if Mr. Payton discussed the testimony with his wife and formed or expressed any opinion before the case was finally submitted to him.

5. That plaintiffs are of recent information and belief that the jury foreman's, Mr. Payton, son may have been injured at one time, which fact Mr. Payton did not state in response to juror voir dire questions.

6. That newspaper articles did appear during the trial.

For these reasons, plaintiffs move the Court for an Order authorizing counsel to approach the jurors. Plaintiff requests an immediate hearing on this matter at the Court's earliest convenience.

JONES, SCHROER, RICE, BRYAN
& LYKINS, Chartered

By Gene E. Schroer
115 E. 7th St.
Topeka, Kansas 66603
913-357-0333
Attorney for Plaintiffs

(Certificate of Service Omitted)

(Caption Omitted)

AFFIDAVIT

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

The undersigned, John G. Greenwood, of lawful age, being first duly sworn, upon his oath, states as follows:

1. That I am the father and natural guardian of the plaintiff in this action.

2. That on our way out of the Courthouse at the close of the evidence on April 23, 1980, an alternate juror, Gary L. McDowell, was talking to Mr. Gomez; that we all said "hello" to one another, whereupon Mr. Gomez left; that Mr. McDowell questioned me regarding the following matters:

a. He was very concerned how plaintiff's attorney had obtained the case, and used the words "ambulance chaser."

b. He was concerned about the amount of plaintiff's attorney's fees.

c. He was concerned about the insurance and settlement aspects of the case.

3. That Mr. McDowell appeared to me to be in such a state of involvement in this case that I sincerely question whether he may have attempted to contact other

jurors during their deliberation, and/or expressed an opinion to the jurors during the trial of this case.

FURTHER THIS AFFIANT SAITH NAUGHT.

/s/ John G. Greenwood
JOHN G. GREENWOOD

Subscribed and sworn to before me this 24th day of April, 1980.

/s/ Nancy L. Cooke
NOTARY PUBLIC

My appointment expires:
10-11-80

(Caption Omitted)

AFFIDAVIT

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

The undersigned, Nancy L. Cooke, of lawful age, being first duly sworn, upon her oath, states as follows:

1. That I am personal secretary and legal assistant to plaintiff's counsel, Gene E. Schroer.

2. That I was present during the trial of the above captioned matter, sitting in the back of the courtroom.

3. That occasionally I could overhear portions of conferences at the bench.

4. That occasionally I could overhear portions of hallway conferences among defense counsel and expert witnesses when jurors were sitting in the near vicinity.

FURTHER THIS AFFIANT SAITH NAUGHT.

/s/ Nancy L. Cooke
NANCY L. COOKE

Subscribed and sworn to before me this 28th day of April, 1980.

/s/ Pamela J. Eichman
NOTARY PUBLIC

My appointment expires:
5-16-83

(Caption Omitted)

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO APPROACH JURORS

Comes now the defendant, pursuant to Rule 23 A, U.S.D.C. Kan., and opposes plaintiff's Motion to Approach Jurors unless such approach is made under the following conditions:

1. Defense counsel is present and is notified of the time and place when such approach is to be made by plaintiff's counsel.

2. The approach is made in the presence of the Court, or a Magistrate Judge of the above-named Court.

3. A record is made so that the questions asked of the jurors can be recorded and will be known.

Defendant contends that such precautions are necessary to avoid undue influence and pressure placed upon jurors concerning the manner in which they discharged

their public duty performed in response to a jury summons.

Respectfully submitted,

FISHER, PATTERSON, SAYLER
& SMITH

520 First National Bank Tower
Topeka, Kansas 66603
Phone 913-232-7761
By: Donald Patterson
Attorneys for Defendant

(Certificate of Service Omitted)

(Caption Omitted)

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION TO APPROACH JURORS

(Filed April 30, 1980)

This products liability action was tried to a jury for some nine days before the jury returned answers to questions propounded by the Court which resulted in a judgment in defendant's favor. The case now comes before the Court upon plaintiff's motion to approach the jurors. The motion is made pursuant to Local Rule No. 23A, which reads as follows:

> Lawyers appearing in this court, as well as their agents or employees, shall refrain from approaching jurors who have completed a case, unless authorized by the Court. Such authorization will be considered only upon formal application to the Court and hearing at which just cause shall be shown.

The scope of inquiry proposed by plaintiff is quite broad. In an attempt to show "just cause" for the request,

plaintiff observes: (1) an alternate juror contacted the Court, counsel for defendant, and plaintiff's father after the jury had retired for deliberation; (2) the jury foreman's wife was present during portions of the trial; (3) the plaintiff is of recent information and belief (such being of undisclosed origin) that the jury foreman's son may have been injured at one time, which the foreman did not state in response to voir dire questions; (4) that newspaper articles did appear during the trial; and (5) one Nancy L. Cooke, while sitting in the courtroom (a) occasionally could overhear portions of conferences at the bench, and (b) occasionally could overhear portions of hallway conferences among defense counsel and expert witnesses when jurors were sitting in the near vicinity.

To accept these contentions as "just cause" for purposes of Rule 23A would require the Court to infer misconduct and conclude that the jurors had ignored the Court's repeated instructions on the basis of absolutely no concrete evidence whatsoever. The jury was instructed to ignore any media reports of the trial, to disregard any statements made during bench conferences, to disregard any information which did not emanate from the "four walls" of the courtroom, and to refuse to discuss the case with any person, including spouses. There is absolutely no direct evidence that any of these admonitions of the Court was not followed by the six jurors who decided this case. The matters asserted by plaintiff are rather mundane and of a type which is likely to arise in any trial. To read these allegations as constituting "just cause" would be to strip Rule 23A of any force and effect it was meant to have.

As we have stated in earlier opinions [*see United States v. Paden*, No. 79-40006-01 (D. Kan., 11/9/79, unpublished)], Rule 23A is an expression of this district's concurrence in the general rule that interviews of jurors by persons connected with a case are not favored by the federal courts except in extreme situations. *Stein v. New York*, 346 U.S. 156, 178 (1953); *McDonald v. Pless*, 238 U.S. 264 (1915); *Mattox v. United States*, 146 U.S. 156 (1892).

The rationale for such a local rule is eloquently and forcefully explicated by Chief Judge Theis in his opinion in *Silkwood v. Kerr-McGee Corp.*, No. CIV-0888 (W.D. Okl., 6/20/79, unpublished). The statements made in that opinion are fully applicable here. Rather than retrace Judge Theis' persuasive discussion, we shall merely append a copy of that decision to this opinion. We deem the reasoning of that case controlling here.

IT IS THEREFORE ORDERED that plaintiff's motion to approach jurors be, and it is hereby, denied.

Dated this 30th day of April, 1980, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

(Caption Omitted)

MEMORANDUM ORDER

This matter comes before the Court on the application of counsel for defendants for permission to interrogate the jurors who deliberated in this case. Local Rule 29(B) (5) of the Western District of Oklahoma requires

that lawyers "refrain from approaching jurors who have completed a case unless authorized by the Court." Defense counsel have filed a formal motion and brief in support of their application.

Because counsel fail to allege a basis sufficient to justify the interviews comprehended by the local rule, as indicated by the Chief Judge of the district in *United States v. Hall,* 424 F. Supp. 508 (W. D. Okla. 1975) (Daugherty, C. J.), *affirmed,* 536 F. 2d 313 (10th Cir. 1976), public policy and judicial disfavor for such post-trial conduct require that this Court deny counsel's application. The Court must order that neither counsel in this lawsuit nor their employees or agents approach any juror in this case for discussion of the litigation. On the record established in counsel's pleadings, this result comports with the vast majority of case law on this point.

Interviews of jurors by persons connected with a case have never been favored by the federal courts except in extreme situations. *Stein v. New York,* 346 U. S. 156, 178 (1953); *McDonald v. Pless,* 238 U. S. 264 (1915); *Mattox v. United States,* 146 U. S. 156 (1892). The reasons for this judicial disfavor should be obvious. In *Clark v. United States,* 289 U. S. 1, 13 (1933), Justice Cardozo spoke of the traditional judicial reluctance to permit inquiry into jury conduct:

> "For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid."

The proper functioning of the jury system requires that the courts protect jurors from being "harassed and beset by the defeated party in an effort to secure from them evidence of facts which establish misconduct sufficient to set aside a verdict." *McDonald v. Pless,* supra, at 267; *United States v. Moten,* 582 F. 2d 654, 664 (2d Cir. 1978); *United States v. Crosby,* 294 F. 2d 928, 950 (2d Cir. 1961). The Fourth Circuit has felt this policy so significant as to condemn unequivocally the practice of post-trial interrogation of jurors by persons connected with the litigation. In *Rakes v. United States,* 169 F. 2d 739, 745-46 (4th Cir. 1948), the Court stated:

> "The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence, or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it."

Limits on the post-trial inquiry into jury verdicts are also necessary in the interest of finality, lest judges "be-

come Penelopes, forever engaged in unravelling the webs they wove." *United States v. Moten*, supra, at 665, *quoting Jorgenson v. York Ice Machinery Corp.*, 160 F. 2d 432, 435 (2d Cir. 1974) (L. Hand, J.). Congress passed the amended, present version of Rule 606(b), Federal Rules of Evidence, in part to limit the scope of any potential interviews or interrogation of jurors who sat on a case. The Senate Report that accompanied the legislation stated:

> "Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606(b) should not permit any inquiry into the internal deliberations of the jurors."

Senate Comm. on the Judiciary, *Rules of Evidence*, S. Rep. No. 1277, 93rd Cong. 2d Sess., *reprinted* in [1974] U. S. Code Cong. & Ad. News 7051, 7060.

These same policies and concerns are part of the jurisprudence of this judicial district and are implicitly reflected in Local Rule 29(B) (5). In *United States v. Hall*, supra, Chief Judge Daugherty had before him a defense counsel's application to interview the jurors following a criminal conviction. There (as here, counsel sought to discover whether the substantial news media publicity of the trial had improperly reached the jurors. Counsel, however, made no specific allegations that extraneous information had been brought to the jury's attention, nor was any reasonable basis shown for cause to

believe that it had. Following the decisions of the Second Circuit, Judge Daugherty denied counsel's application. He quoted from *United States v. Crosby*, supra, at 950:

> "There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain."

United States v. Hall, supra, at 538. Judge Daugherty further quoted from *United States v. Miller*, 284 F. Supp. 220 (D. Conn.), *affirmed*, 403 F. 2d 77 (2d Cir. 1968) (Friendly, J.):

> "To maintain the integrity of our jury system for reaching final decisions requires that its internal process shall be inviolable, even in court proceedings. Any inquiry outside that area which may be permitted of them ought be adequately restricted to safeguard that integrity.
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>
> "Leaving jurors at the mercy of investigators for both sides to probe into their conduct would make the already difficult task of obtaining competent citizens willing to serve as jurors well nigh impossible."

United States v. Hall, supra, at 538.

This salutary rule has developed in numerous circuits, as well as in this judicial district. It becomes proper to question jurors only when reasonable grounds exist to cause the Court to believe that the jury may have been improperly exposed to extraneous influence or information. This is the Court's determination. An applicant

must demonstrate the existence of this juror misconduct through a clear, strong, or incontrovertible showing, and mere speculation or hypothesis is not sufficient to warrant further intrusion into the jurors' lives and thoughts. *King v. United States*, 576 F. 2d 432, 438 (2d Cir. 1978).

To borrow again from Judge Daugherty's language, counsel's application in the absence of any such showing amounts to nothing more than "browsing among the thoughts of the members of the jury." These interviews "would amount to a pure fishing expedition inspired by adverse verdicts." *United States v. Hall*, supra, at 539. Judge Daugherty condemned such practice as useless and harmful to the jury system. *Id.*

To some extent, this view is shared by virtually every Court of Appeals in the country that has passed on the question. One of the preeminent jurists in this country, Judge Friendly, of the Second Circuit Court of Appeals, has characterized the "systematic, broadscale, posttrial inquisition of the jurors" as "reprehensible" in an opinion relied upon by Judge Daugherty in *United States v. Hall*, supra. *Miller v. United States*, supra, 403 F. 2d at 81. See also *Peterman v. Indian Motorcycle Co.*, 216 F. 2d 289, 293 (1st Cir. 1954); *United States v. Dioguardi*, 492 F. 2d 70 (2d Cir. 1974); *United States ex rel. Daverse v. Hohn*, 198 F. 2d 934 (3rd Cir. 1952) (disapproving in general the practice of post-trial interviews); *Rakes v. United States*, supra; *Dickinson v. United States*, 421 F. 2d 630 (5th Cir. 1970) (jurors should not be exposed to "fishing expeditions"); *United States v. Franks*, 511 F. 2d 25 (6th Cir. 1975); *Stephens v. City of Dayton, Tenn.*, 474 F. 2d 997 (6th Cir. 1973) (abuse of discretion to authorize in-

terrogation where party sought to impeach verdict); *Bryson v. United States*, 238 F. 2d 657 (9th Cir. 1956); *Northern Pac. Ry. v. Me'y*, 219 F. 2d 199 (9th Cir. 1954); *United States v. Narcisco*, 446 F. Supp. 252, 324 (E. D. Mich. 1977); *United States v. Brasco*, 385 F. Supp. 966, 970 n. 5 (S. D. N. Y. 1974), *aff'd.*, 516 F. 2d 816 (2d Cir. 1975); *United States v. Sanchez*, 380 F. Supp. 1260, 1265 (N. D. Tex. 1973) (Brewster, J.) (practice of unbridled interviews described as "disgusting"), *aff'd.*, 508 F. 2d 388 (5th Cir. 1975); *Gilroy v. Eric Lackawanna R. R.*, 279 F. Supp. 139 (S. D. N. Y. 1968).

Absent clear evidence of extraneous influence or information improperly brought to the jury's attention, courts have uniformly denied counsel leave to conduct post-trial interviews of jurors. *King v. United States*, supra ("frail and ambiguous showing"); *United States v. Eagle*, 539 F. 2d 1166, 1171 (8th Cir. 1976) (no specific allegations of improper acts); *United States v. Franks*, supra; *United States v. Green*, 523 F. 2d 229 (2d Cir. 1975); *United States v. Dye*, 508 F. 2d 1226, 1232 (6th Cir. 1974); *Smith v. Cupp*, 457 F. 2d 1098 (9th Cir. 1972) (no specific claim of misconduct); *United States v. Allied Stevedoring Corp.*, 258 F. 2d 104 (2d Cir. 1958) (speculation not deemed "adequate grounds"); *Capella v. Baumgartner*, 59 F. R. D. 312 (S. D. Fla. 1973) (speculation that impropriety might have occurred found insufficient); *United States v. Driscoll*, 276 F. Supp. 333 (S. D. N. Y. 1967), *reversed on other grounds*, 399 F. 2d 135 (2d Cir. 1968).

Counsel states that it would be error to deny the application and implies that the Court lacks authority to

intervene in the lawyers' or parties' interrogation of jurors. These assertions are both patently unsupportable. A district judge has the power—indeed, in some cases he or she has the duty—to order that all post-trial investigation of jurors shall be under supervision of the court and restricted to matters the court deems relevant and proper. *United States v. Moten*, supra, at 665-66; *Miller v. United States*, supra, at 81-82 (Friendly, J.); *United States v. Franks*, supra; *United States v. Brasco*, 516 F. 2d 816, 819 n. 4 (2d Cir. 1975).

Some courts have approved the practice that attorneys must petition the court before contacting any juror. *United States v. Riley*, 544 F. 2d 237 (5th Cir. 1976); *United States v. Brasco*, supra; *Beanland v. Chicago R. I. & Pac. R. R.*, 345 F. Supp. 227 (W. D. Mo. 1972). Some jurisdictions require that all attorney-juror contact be strictly regulated by the court. *United States v. Winters*, 434 F. Supp. 1181 (N. D. Ind. 1977); *Womble v. J. C. Penney Co.*, 47 F. R. D. 350 (E. D. Tenn. 1969). It is the duty of this Court to insure that the zealousness of counsel does not impair the proper functioning of the jury system.

Defense counsel in this case have not made any showing of improper introduction of outside information or influence into the deliberations that would cause this Court to conduct an inquiry into the area of the jury's deliberations permitted by Rule 606(b). Counsel do not even speculate that there might have been such misconduct. Rather, they seek leave to interrogate the jurors to determine whether any such misconduct might have occurred. Coun-

sel also state that the interviews are for additional purposes as well.

This is the precise type of broadscale inquiry into jury deliberations criticized by Judge Friendly in *Miller v. United States,* supra, by the Fourth Circuit in *Rakes v. United States,* supra, and by the district court in *United States v. Driscoll,* supra. Counsel's application is sufficiently similar to that ruled upon by Judge Daugherty in *United States v. Hall,* supra, to fall within the rubric of those interviews that ought properly to be forbidden by the district courts. Absent a sufficient, specific showing of Rule 606(b) misconduct, counsel's application must be denied. Other possible information gained through post-trial questioning of jurors, which does not fit within Rule 606(b), would serve no legitimate legal purpose. It would not justify the interviews sought here.

Counsel argue that a rule barring interviews until a showing has been made precludes the use of the sole means by which a showing can be made. This argument, however, was found unpersuasive by Judge Friendly when he spoke to Congress regarding the amendment to Rule 606(b). See *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary,* 93rd Cong. 1st Sess. No. 2, 250, 256 (1974). The eminent jurist there indicated that the situation did not warrant the investigation of the jury's deliberations sought by counsel. Counsel here should be reminded that it is the jurors' duty to be conscientious in reporting to the Court any misconduct that occurs during jury deliberations. H. R. Conf. Rep. No. 1597, 93rd Cong. 2d Sess., *reprinted* in [1974] U. S. Code Cong. & Ad. News 7051, 7102.

This Court, however, has additional reasons for denying the application of counsel. First is the jurors' indication to this Judge that they sought to avoid the publicity and intrusion that private interviews would involve. Each juror communicated to this Judge his or her desire to avoid interviews with the parties, their lawyers, or with the press. The jurors agreed among themselves not to discuss the case or their deliberations with others, and they informed this Judge of that desire. This attitude is commendable on their part.

This Court has recently spoken by telephone with the jury's forewoman, who stated that this is still her own desire and her understanding of the desires of the other jurors from post trial communications with them. The Court must add that upon his inquiry, the forewoman responded that at no time was any extraneous information or influence brought to the jury's attention. She stated that none of the publicity regarding this trial or any other nuclear incidents or viewpoints occurring during the time of trial was brought into the jury's deliberations, and that no one approached any juror with comments about the case during its pendency. She indicated that each juror understood that if such took place, or if outside information or influence was brought to the jury's attention, the jurors had the duty to so inform the Court immediately. This jury had a correct apprehension of their oath and obligations.

The Court further notes the inevitable consequence of permitting counsel to interview the jurors in this case. Since the conclusion of this trial, numerous comments have been published regarding the verdict in this case and

its possible effects. The publicity surrounding the verdict has been substantial and national in scope. To represent that various news media have demonstrated an abiding interest in the most detailed minutiae of every aspect of this case would be a miracle of understatement. Eliciting statements of jurors on this case, regardless how innocuous those statements might be, would doubtless lead to public debate over the deliberations, the verdict, and possibly over the individual jurors themselves, all of which the rules of evidence would forbid in a court of law. This could only lead to a distortion of truth, the creation of misunderstandings, and quite possibly to a significant impairment of our system of justice—in all, a "Pandora's box of ill effects more than offsetting any benefit" derived from the inquiry. See 120 Cong. Rec. H550-51 (daily ed. Feb. 6, 1974) [remarks of Rep. Wiggins on amendment to Rule 606(b)]. Counsel's application, as it is presented to this Court, is insufficient to warrant leave to interview the jurors in this case.

The jurors in this case did not volunteer for service but were selected after an intensive voir dire examination by both the Court and counsel for the parties to eliminate any possible prejudice and to impress on them the solemnity and scope of their duties as jurors. The jurors were a most representative group of Oklahoma citizens of both sexes, ages, various employments, and excellent intellectual capacity. They served as required by their government and the laws of this country. In view of the public interest manifested in the trial, the complexity of some of the evidence on the scientific matters, and the inordinate length of trial time, they did so only at great sacrifice to themselves and their families. All counsel in

this case, and this Judge himself, commended these jurors for their admirable performance of a very difficult task under very taxing circumstances. The individual jurors in this case, including the four alternates who dutifully served, impressed the Court, his staff, and the lawyers in this case, with their attentiveness and conscientiousness. The few comments of jurors that appeared in local Oklahoma City newspapers after the trial reflected that the jurors understood this Court's admonition and governed themselves by its terms. There is absolutely no basis on these facts to support any further inquiry of the jurors.

At the close of this case the jurors expressed their desire to retreat from the public eye before which they had been placed, and to return to their private lives. Several, however, have regretfully received numerous communications from unknown individuals across the country who offer gratuitous comments on the verdict reached. Such intrusions into the private lives of these citizens are unfortunate and unwarranted. Continued public exposure of the jurors and their thoughts and feelings about this case, which would likely follow interviews with counsel, would only exacerbate this situation. The Court has a vital interest in seeing that jurors are not harassed or placed in doubt about what their duty is and that false issues are not created. *Miller v. United States*, supra, at 82. Absent a proper showing by counsel, the Court must deny the application.

IT IS THEREFORE ORDERED that the application of defense counsel for authorization to interview the jurors in this case is hereby denied.

IT IS FURTHER ORDERED that all counsel in this case, their agents and employees, refrain from interviewing any juror who sat in this case regarding the litigation without first seeking leave of Court.

At Wichita, Kansas, this 20th day of June, 1979.

/s/ Frank G. Theis
United States District Judge

(Captioned Omitted)

PLAINTIFF'S SECOND MOTION TO APPROACH JURORS

Comes now the plaintiff, pursuant to U. S. D. C. Rule 23A, and moves the court for an Order allowing counsel for plaintiff to approach the jurors in this matter regarding those matters set forth in plaintiff's First Motion, and for the following reasons:

1. All grounds previously urged;

2. The Affidavit of John G. Greenwood, attached;

3. Rule 23A and the court's Order pursuant to same rule violates the First and Fifth Amendments to the United States Constitution.

Counsel for plaintiff shows to the court that to our best recollection and belief, Juror Payton did not answer counsel's question in the affirmative as to whether he or any member of his immediate family had ever been seriously injured. The Affidavit of John G. Greenwood attached affirms that Juror Payton's son was seriously injured in a truck tire explosion. Had voir dire questions

been answered truthfully, further examination may have revealed grounds to challenge Juror Payton for cause, or affected counsel's decisions with respect to peremptory challenges.

Accordingly, for all the above reasons, plaintiff moves the court for an Order allowing counsel for plaintiff to approach the jurors.

JONES, SCHROER, RICE, BRYAN
& LYKINS, Chartered

By Gene E. Schroer

115 East Seventh Street
Topeka, Kansas 66603
(913) 357-0333

Attorneys for Plaintiff

(Certificate of Mailing Omitted)

(Caption Omitted)

A F F I D A V I T

I, JOHN G. GREENWOOD, of lawful age, being first duly sworn upon oath depose and state:

1. That I am employed as Recruiter in Charge, Navy Recruiting Station, Topeka, Kansas;

2. That one Mr. Payton, son of jury foreman Payton, made application to enlist in the Navy;

3. That since the conclusion of the trial, herein, it has come to my attention that said Mr. Payton is the son of jury foreman Payton;

4. That in the regular corse (sic) of my employment as a navy recruiter I reviewed the application of said Mr. Payton;

5. Said application indicates that said Mr. Payton was seriously injured in an explosion of a truck tire.

/s/ John G. Greenwood
JOHN G. GREENWOOD

STATE OF KANSAS)
) SS:
COUNTY OF SHAWNEE)

BE IT REMEMBERED that on this — day of May, 1980, before me, the undersigned, a Notary Public in and for the County and State aforesaid, appeared John G. Greenwood, who is personally known to me to be the person who executed the foregoing Affidavit, and such person duly acknowledged the execution of the same.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal the day and year last above written.

_____
Notary Public

My appointment expires:

_____

(Captioned Omitted)

ORDER GRANTING PLAINTIFF'S SECOND MOTION TO APPROACH JURORS

(Filed May 5, 1980)

This case comes before the Court upon plaintiff's renewed and supplemental motion to approach jurors pursuant to Local Rule 23A.

Upon due consideration, but cognizant of the parties' need for a speedy ruling, the Court, in an abundance of caution, has determined to grant the motion in a limited degree. The motion will be generally overruled with the exception that counsel for plaintiff will be allowed to inquire of juror Ronald Payton regarding alleged injuries sustained by his son from the explosion of a truck tire.

The inquiry should, of course, be brief and polite. Defense counsel must be present. The witness should not be unnecessarily inconvenienced. The inquiry should be undertaken telephonically or at a place convenient to the juror. The juror should not be summoned to Topeka solely for this purpose.

Counsel should be informed that the Court's review of the court reporter's notes of *voir dire* indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged *and* (2) the son sustained a disability or suffered prolonged pain.

Frankly, the Court is not overly impressed with the significance of this particular situation. It would seem that a juror whose son had been injured in a products

liability setting would be the type of juror that plaintiff would be looking for in this type of case. We note that at least one other juror who responded affirmatively to this particular area of questioning was not the subject of a peremptory challenge from either side.

We note further that nondisclosure of information by a juror on *voir dire* is generallly not grounds for a new trial unless (1) the juror was guilty of intentional deception, or (2) plaintiff can show clear prejudice. *See* 47 Am. Jur. 2d *Jury* §§ 208-210 (1969); 66 C. J. S. *New Trial* § 22 (1950).

We expect counsel's inquiry to be in keeping with the spirit of Local Rule 23 A.

IT IS THEREFORE ORDERED that the plaintiff's second motion to approach jurors be generally denied, except as to the limited inquiry of juror Payton under the conditions specified herein.

Dated this 5th day of May, 1980, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

(Captioned Omitted)

PLAINTIFF'S MOTION FOR A NEW TRIAL

COMES NOW the plaintiff, pursuant to F. R. Civ. P. 59 and move this Court for an Order granting the plaintiff a new trial on the grounds set forth below.

MEMORANDUM

1. Error in granting "Defendant's Motion in Limine" (treated as summary judgment) on warnings in the Order of March 14th, 1980. The Court granted defendant summary judgment on the issue of the inadequacy of the warnings given. At the trial, the Court sustained defendant's objection to plaintiff's attempts to show the inadequacy of the warnings, on the grounds that the issue of warning was out of the case, yet allowed the defendant to present evidence that Ira and Jeff Morris failed to read and heed their warnings. This was patently unfair and obviously prejudicial in light of the fault apportioned to both Ira and Jeff Morris.

2. Error in denying plaintiff's "Motion in Limine" in the Court's Order of March 14th, 1980. The plaintiff reasserts his objection to all evidence of compliance with industry custom and practice, compliance with voluntary safety standards, and all evidence concerning the promulgation or non-promulgation of mandatory safety standards since 1972. In addition to the authorities cited in plaintiff's Motion in Limine and the briefs in support of said motion, plaintiff would refer the Court to the case of *Holloway v. J. B. Stevens, Ltd.*, — F. 2d — (3d Cir. Nov. 26, 1979), 48 U. S. Law Week 2415 (No. 24, Dec. 18, 1979), 7 Product Safety & Liability Rptr. 950.

3. Error in overruling plaintiff's Second Motion in Limine and objections made at trial on evidence that Ira Morris disconnected the ignition interlock switch.

4. Error in overruling plaintiff's objections at trial regarding other evidence, i. e. muffler, grass catcher, chute

extension, on the condition of the mower which admittedly had nothing to do with the injury.

5. Error in overruling plaintiff's Motion to Reinstate Defects Claimed in the Pretrial Order, after having overruled plaintiff's Second Motion in Limine.

6. Error in denying plaintiff's Motion to Amend the Pretrial Order to claim punitive damages, after having overruled plaintiff's Motion in Limine, forcing plaintiff into the posture of trying this case against the entire industry.

7. Error in sustaining defendant's objection during the direct testimony of Professor Sevart to evidence of the durability of the blade brake clutch.

8. Error in allowing improper cross examination of Professor Sevart (see "Suggestions Regarding Evidentiary Rulings during the Cross Examination of Plaintiff's Expert," filed April 14th, 1980), and admitting into evidence defendant's exhibit "G-1," Sevart paper number 76-402.

9. Error in admitting into evidence defendant's exhibit "K," (1972 ANSI Standards) and in allowing defendant to show compliance with same.

10. Error in admitting into evidence defendant's exhibits "L" (Consumer Product Safety Commission Safety Standards for Walk-Behind Mowers, 2/15/79), "M" (Consumer Product Safety Commission Proposed Safety Standard, 5/5/77), "R" (Consumers Union Proposed Safety Standard), "S" (Consumers Union Rationale for Proposed Safety Standard), "T," "U," "V," and "W" (minutes of the blade contact sub-committee of Consumers

Union), "X" (McDonough letter to Professor Sevart dated 5/23/75), "Y" (McDonough letter to Professor Sevart dated 10/6/75), and "A-1," (Consumers Union Task Force Rationale and Report).

11. Error in admitting into evidence parts of the deposition of Joseph Silbereis regarding evidence of testing performed on the McDonough mower by United States Testing Company.

12. Error in allowing Mr. Jackson, listed as an expert witness by defendant, to testify in support of his opinion about the fact that the blade bar was not the original blade bar installed on the machine, when said fact was not disclosed in answers to interrogatories and surprised the plaintiffs.

13. Error in declining to give plaintiff's requested instructions, filed April 21st, 1980.

14. Error in overruling plaintiff's objections to the Court's instructions, filed April 21st, 1980.

15. Error in overruling plaintiff's objections to the Court's revised instructions, filed April 22, 1980.

16. Error in comment by the Court on evidence in the presence of the jury, and in commenting on defendant's objections and admonishing plaintiff's counsel in the presence of the jury.

17. Error in returning the jury to further deliberate after the jury had returned a verdict contrary to the Court's instructions.

18. Error in denying plaintiff's motions to approach the jurors, thus depriving plaintiff of the opportunity to

present evidence of juror misconduct in support of this motion.

Plaintiff incorporates herein by reference all arguments and authorities shown to the Court in the above referenced pleadings and those in plaintiffs' (sic) trial brief. Accordingly, plaintiff moves the Court for an Order granting him a new trial in this matter.

Plaintiff requests oral argument on this motion, and requests leave of Court to subpoena the jurors to give testimony at the hearing on this motion.

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& LYKINS, Chartered

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(Caption Omitted)

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff filed a motion pursuant to Rule 59, F. R. C. P. Following the motion in a section labeled "Memorandum", plaintiff set out what appears to be grounds which defendant will attempt to answer paragraph by paragraph. The number designation of the defendant will correspond to the numbered paragraphs of the plaintiff's Memorandum:

1. WARNINGS

The ruling of the Court was correct. Defendant gave a warning which appeared in the manual (Defendant Exhibit A). The manual was offered and received into evidence without objection. Certainly the defendant ought to be entitled to show the warning that was actually given, regardless of whether or not it was ever read. The Court ruled the warning issue out of the case because of the fact that the warning that was given, whether or not it was adequate or inadequate, was never read. The uncontradicted evidence was that it was placed into a bureau drawer and remained there until after the accident occurred. Neither the buyer of the mower, Ira Morriss, nor his son, Jeffrey Morriss, the operator, ever read the manual prior to the accident. Assuming but without admitting plaintiff is correct that the warning in the manual was inadequate, the inadequacy had no causal connection whatever with the accident since it was never read. The defendant has a right to assume that those warnings which are adequately given may be heeded. *Brooks v. Dietz*, 218 Kan. 698, 545 P. 2d 1104; § 402 A *Restatement of Torts 2d*, Comment *j*; *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 F. 2d 1383. The evidence further showed that failure to follow some of the warnings given did indeed contribute to the accident, and constituted part of the fault of Ira Morriss and Jeff Morriss.

2. EVIDENCE OF COMPLIANCE WITH INDUSTRY CUSTOM AND PRACTICE, VOLUNTARY SAFETY STANDARDS, ETC.

This point was covered at length in defendant's Memorandum Brief in Opposition to Plaintiff's Motion in Limine filed August 16, 1979, and will not be repeated here.

Defendant does wish to refer the Court to it, however. Even though plaintiff did not agree, some of the defendant's experts testified that the 1972 ANSI Standards were reflective of the state of the art. (Testimony of Gilbert Buske) To a lesser degree, Mr. Chalmers agreed. Even Mr. Sevart agreed that some of the other standards that were considered but not adopted after 1972 were reflective of the state of the art at the time they were considered. In essence, Bertram Strauss said the same thing, since he authored some of the documents that constituted the proposed standard itself, and the rationale which explained the adoption of the standard. All of this information, by the admission of these witnesses, was evidence of the state of the art at the time or what various engineers and experts thought was the state of the art at the time. There can be no question but what evidence of the state of the art, as defined by the Court, is relevant to the issue of consumer expectations. *Bruce v. Martin-Marietta Corp.*, 544 F. 2d 442 (10 Cir. 1976). See also *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 632, 549 P. 2d 1383.

3. DISCONNECTION OF IGNITION SWITCH BY IRA MORRISS

Plaintiff's entire case was hinged upon the fact that the machine should have been equipped with a deadman blade brake; that it would not have been inconvenient in use; that it would have been operational; and that it would have been used. The defense evidence was to the effect that safety devices, if inconvenient, have been known to be bypassed by customers, and this is a legitimate concern of the feasibility of any safety device being considered. The fact that the owner in question was capable of bypass-

ing a safety device is highly relevant on the issue of causation between a safety device proposed by the plaintiff, which contained some inconvenient features, and the manner in which the relevant owner in fact reacted to it. The evidence was relevant therefore on the issue of causation.

4. CONDITION OF MUFFLER, GRASS CATCHER, CHUTE EXTENSION, ETC.

These admittedly had nothing to do with the accident but they do show the care and treatment the mower received at the hands of Ira Morriss. There is evidence to show that the machine had been altered subsequent to the time the accident occurred in a relevant manner. The witness Silbereis testified that when the machines left the factory, the blade travel was entirely within the housing. Immediately after the accident occurred, the blade travel of both the original blade and the substitute blade on the mower at the time the accident occurred was below the deck. Sometimes a material alteration in a product exonerates a manufacturer as a matter of law. *Texas Metal Fabricating Co. v. Northern Gas Products Corp.*, 404 F. 2d 921 (10 Cir. 1968). On other occasions the question of proximate cause is one of fact if it includes the issue of foreseeability. *Blim v. Newberry Industries, Inc.*, 443 F. 2d 1126 (10 Cir. 1971). The question of whether or not the blade travel was altered because of the abuse or misuse by Ira Morriss was an issue before the jury, and the care and treatment the mower received generally was relevant to that issue.

5. PLAINTIFF'S MOTION TO REINSTATE DEFECTS CLAIMED IN THE PRETRIAL ORDER

On March 14, 1980, the Court ruled that with respect to improper dynamic stability, lift-off, confusing foot controls, plaintiff conceded the defendant's position. These had no causal connection whatever with the injury that occurred. The Court was correct in eliminating them from the case. If the paragraph refers to negligence and breach of implied warranty, the Court was within his discretion in disallowing the amendment at that late date.

6. PUNITIVE DAMAGES

The Court was within his discretion in denying plaintiff's request to amend to include punitive damages. This is another issue, requiring a different standard of proof and different elements and would have forced the defendant into extensive trial preparation beyond that which had already been made. Trial was already in progress and the timing of the motion was most inappropriate. Defendant cannot understand the plaintiff's contention that plaintiff was forced into a position of trying the case against the entire industry. One of the concepts of "unreasonably dangerous" is consumer expectations. This evidence can include state of the art at various times, and witnesses of the defendant testified that various standards, proposed standards, and performance specifications being considered for standards were reflective of the state of the art at the time of their adoption or consideration. See *Bruce v. Martin-Marietta Corp.*, supra.

7. DURABILITY OF THE BLADE CLUTCH BRAKE

Objections were sustained initially to questions pertaining to the durability of the defendant's blade clutch brake. The condition of the blade clutch brake had no causal connection whatever with the accident since it was never used, and its condition had no effect whatsoever upon the operator's failure to use it. The Court later reversed this position on plaintiff's counsel's statement that he would "connect" the condition of the brake with the case later on, but he never did. Plaintiff was permitted to show the condition of the brake, and its durability, through the cross-examination of witnesses Boylston and Jackson so any objections that were sustained during the direct examination of Professor Sevart were not prejudicial to the plaintiff since the same information paraded before the trier of fact by other means. The evidence would have simply been cumulative of other evidence obtained by plaintiff's cross-examination of witnesses Jackson and Boylston.

8. DEFENDANT'S EXHIBIT "G-1"

This was a paper authored by Professor Sevart entitled "Development of Performance Criteria and Test Procedures for a CPSC Mandatory Safety Standard for Power Lawnmowers". This was most relevant because in it Mr. Sevart admitted that the end result of his efforts, the mandatory standard proposed by Consumers Union to the Consumer Product Safety Commission was "a quite meaningful standard". This standard included some blade stopping times that were quite different than those proposed by Professor Sevart and is evidence of the fact that he felt that the standard was reflective of the

state of the art at the time it was developed, which was subsequent to the date of manufacture of the mower in question. It could, and possibly did have an impeaching effect upon the direct examination of Professor Sevart and was properly received.

9. DEFENDANT'S EXHIBIT "K"—1972 ANSI STANDARDS

These standards were received for a limited purpose. The Court ruled in Instruction No. 9 that such information could be considered by the jury on the issue of reasonable expectation of consumers, and the feasibility of safety devices which plaintiff claims should have been on the defendant's mower but were not. The relevance of industry standards is made clear under substantive law of Kansas in *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P. 2d 1383 (Kan. 1976). Other witnesses testified that they were the equivalent of the state of the art at the time. (Testimony of Buske). State of the art evidence is relevant to the issue of consumer expectations. *Bruce v. Martin-Marietta Corp.*, 544 F. 2d 442 (10 Cir. 1976).

10. DEFENDANT'S EXHIBITS SHOWING ACTIVITIES OF AUTHORS OF STANDARDS AND PROPOSED STANDARDS

Defendant's Exhibits "L" (Consumer Product Safety Commission Safety Standards for Walk-Behind Mowers), "M" (Consumer Product Safety Commission Proposed Safety Standard 5/11/77); "R" (Consumers' Union Proposed Safety Standard); "S" (Consumers Union Rationale for Proposed Safety Standard), "T", "U", "V", and "W" (Minutes of the Blade Contact Subcommittee of Con-

sumers Union) are all reflective of the state of the art of blade stopping devices on the date they bear, which was subsequent to the date of manufacture of the mower in question. The state of the art revealed a stopping device that had a stopping time much slower than any that would have been effective in stopping the accident in question. It was relevant therefore both on the issue of consumer expectations, and proximate cause. See *Bruce v. Martin-Marietta Corp.*, supra. The exchange of correspondence between McDonough and Professor Sevart concerning the mower that Professor Sevart purchased, or assisted in purchasing (Defendant's Exhibits "X" and "Y") serve to impeach Professor Sevart on his opinion of the defectiveness of the condition of the mower subsequent to the date of manufacture of the mower in question but prior to the occurrence of the Greenwood accident. They were admissible for impeachment purposes.

11. SILBEREIS DEPOSITION

The condition of the mower at the time it left the hands of the manufacturer is certainly relevant. The portion of the Silbereis deposition read by the defendant concerned the condition of the mower, with respect to the position of the blade travel in relationship with the blade housing. Since a blade travel below the housing was a defect relied upon by plaintiff, the non-existence of such defect at the time it left the hands of the manufacturer was relevant and proper. Although the record will correct defense counsel if correction is needed, at the time of this writing he can recall no objection being made by the plaintiff to such reading.

12. ORIGIN OF THE SUBSTITUTE BLADE BAR

Rule 26(b) (4) requires the defendant to reveal the name and address of his experts, the subjects upon which he will give an opinion; the substance of the opinion, and the factual basis for each opinion. The information was simply an observation made by Mr. Jackson. It did not form the basis of any opinion that he gave. In fact defendant cannot recall any opinion solicited from Mr. Jackson. He simply testified concerning what he did; what he saw; and what he observed. Plaintiff was given two opportunities to secure his discovery deposition. One was in Topeka, Kansas, in June of 1977, and the other was in McDonough, Georgia, in September, 1977. The information was not obtained from Mr. Jackson but through no fault of the defendant. There was no error in allowing Mr. Jackson to testify to what he observed. Bars and blades were removed from the mower after the accident and prior to the time it was observed by any of the defendant's personnel. Certainly there could have been plenty of opportunity for error in mixing up blades and bars, but if such occurred, the defendant played no part in it since Mr. Jackson was the first one to see the mower after the accident. He simply reported what he saw and nothing more.

13-15. INSTRUCTIONS

Plaintiff will be deemed to have waived any and all objections that were not made in his last opportunity to make objections prior to the time the case was submitted. *Dunn v. St. Louis-San Francisco Railway Co.*, 370 F. 2d 681 (10 Cir. 1966.) Otherwise they become the law of

the case pursuant to Rule 51, F. R. C. P. Defendant cannot recall all objections made since they were made orally, but will stand on the correctness of the ruling that were made by the Court as reflected by the record.

16. JUDICIAL COMMENT

The only judicial comment the defendant can recall is one made when the Court sustained a defense objection concerning the condition of the blade brake that was never used by Jeff Morriss because he had no time to use it. First of all the defendant contends the comment was entirely appropriate. However the Court changed his ruling later on and permitted evidence on the subject thereby eliminating any possibility of prejudice to the plaintiff's position.

17. DIRECTING THE JURY TO ANSWER A DAMAGE INTERROGATORY

Rule 49(a) permits special verdicts, and the Kansas substantive law on comparative negligence, as construed by this Court in *Stueve v. American Honda Motor Co.*, 457 F. Supp. 740, requires them. Under Rule 49(a), the Court has the power to return an issue to a jury if a jury does not answer a question, and if the parties do not request it, they waive their right to trial by jury on the issue. Pursuant to Rule 49(b), when the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the Court may return the jury for further consideration of its answers and even permit changes and a verdict can be entered thereon or the Court may in his discretion, order a new trial. See

Bartholomew v. Universe Tank Ship, (S. D. N. Y. 1957), 168 F. Supp. 153. In *Turchio v. D/S A/S Den Norske Africa,* 509 F. 2d 101 (Ca. II 1974) the Court held that the trial court had the power to return a jury to answer an unanswered special question, but under the circumstances of that case granted a new trial because of the confusion preceding the end result.

An additional point exists in this case in that the unanswered question had no affect whatsoever upon the judgment that was ultimately returned. Had the question remained unanswered, the Court would have had power to enter judgment anyway, since an interrogatory on damages was irrelevant to a judgment for the defendant. In this circumstance, a trial court has been held to have authority to enter judgment even though the interrogatory was not answered. In *Black v. Riker-Maxson Corp.,* 401 F. Supp. 693 (S. D. N. Y. 1975), the Court said at page 696:

> "[1] Plaintiffs cite no authority to support their argument that the failure of the jury to answer questions 2(a), 2(b) and 3 constitutes grounds for a new trial; actuallly the law is to the contrary. The failure by a jury to answer some of the questions in a special verdict does not vitiate an otherwise unanimous verdict where the unanimous answers to the verdict conclusively dispose of the case. *Skyway Aviation Corp. v. Minneapolis, Northfield & Southern Railway Co.,* 326 F. 2d 701 (8th Cir. 1964); *Kissel v. Westinghouse Electric Corp., Elevator Division,* 367 F. 2d 375 (1st Cir. 1966); *Pacific Indemnity Co. v. McDermott Brothers Co.,* 336 F. Supp. 963, 967 (M. D. Pa. 1971)."

Plaintiff's counsel might contend that an answer to such a special interrogatory is mandated by K. S. A. 60-258a. This Court has previously observed that K. S. A. 60-

258a has both procedural and substantive provisions. The substantive provisions are binding but the procedural provisions are not. *Greenwood v. McDonough Power Equipment, Inc.*, 437 F. Supp. 707, and cases cited therein; *Nagust v. Western Union Telegraph Co.*, 76 F. R. D. 631 (D. C. Kan. 1977); *Hanna v. Plummer*, 380 U. S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965).

18. APPROACH OF JURORS

Defendant will stand by the correctness of this Court's Order filed April 30, 1980, and Local Rule 23 A. The rationale for the rule is adequately explained in *Silkwood v. Kerr-McGee Corp.*, No. CIV-0888 (W. D. Okl. 6/20/79) unpublished, which was referred to by this Court in the April 30, 1980, Order. Defendant adopts the rationale of the *Silkwood* opinion and all cases cited therein.

For all of the foregoing reasons, defendant submits that plaintiff's Motion for New Trial be denied in its entirety.

Respectfully submitted,

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(Certificate of Service Omitted)

(Caption Omitted)

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

(Filed June 5, 1980)

This action comes before the Court upon plaintiff's motion for a new trial. The matters raised by the motion have all been the subject of previous rulings by this Court. Many of the matters have been ruled upon several times. The Court stands by its earlier rulings. The Court is convinced that the matter was fairly and thoroughly tried and that the jury's verdict was a just one, well-supported by the evidence.

The motion for a new trial will be denied. Plaintiff's time to appeal will begin to run with the filing of this Order.

IT IS SO ORDERED.

Dated this 2nd day of June, 1980, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge